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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-693

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, the Honorable Hubert L. Will, Judge, United States District Court for the Northern District of Illinois, by his counsel, prays that a writ of certiorari issue to review the issuance of a writ of mandamus by the United States Court of Appeals for the Seventh Circuit on August 15, 1977, and that, summarily or upon hearing, the issuance of the writ of mandamus be reversed.

Opinion Below

The opinion of the court of appeals (Appendix 1) is reported at 560 F.2d 792.

Jurisdiction

The writ of mandamus was issued by the court of appeals on August 15, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the district courts of the United States have been deprived by this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), of all discretion to stay proceedings pending before them in the interest of judicial economy and to avoid duplicative litigation.

2. Whether the United States district courts have a clear legal duty enforceable by mandamus "immediately" to try cases before them despite the fact that prior-commenced litigation between the same parties raising the same legal and factual issues is proceeding in a state court in a manner that may well render the entire federal case moot.

3. Whether this Court's opinion in *Colorado River* entitles a litigant effectively to compel a United States district judge by writ of mandamus to engage in a race with a state court to decide identical legal issues pending in both courts between the same parties, when the judge reasonably believes such a race to be unnecessary and wasteful.

Statutory Provision Involved

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Facts

The recitation of facts is selected from the opinion below substantially in that court's own language.[1]

Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool."

Calvert [became] a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials. In April 1974, Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool. Calvert notified American Mutual that it intended to rescind its agreement to participate in the pool. Litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert*	*Calvert* v. *American Mutual*
Circuit Court of Cook County, Illinois	United States District Court for the Northern District of Illinois
July 3, 1974	
American Mutual sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.[2]	

[1] Additions are listed in brackets; deletions are not indicated.
[2] The complaint without exhibits is attached as Appendix 3.

January 10, 1975

Calvert filed an answer alleging that the agreement was void because American Mutual violated [Section 5 of] the 1933 Securities Act, [Rule 10b-5 promulgated under] the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.

January 10, 1975

Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds [state and federal] as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as [damages] for alleged violations of Rule 10b-5 of the Securities Exchange Act. [4]

With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act. [3]

Judge Will stayed proceedings in the case before him pending the outcome of the state proceedings listed above. The court of

[3] The answer and counterclaim is attached as Appendix 4.

[4] The federal complaint without exhibits is attached as Appendix 5.

appeals issued a writ of mandamus compelling him "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934."

Judge Will's Opinion

On May 6, 1975 Judge Will issued the memorandum opinion and order at issue here. The order stayed proceedings in the federal courts on all claims alleged in Calvert's complaint, except the claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The opinion and order are attached as Appendix 2. The result has been to postpone all adjudication in federal court pending the outcome of the state proceedings.

Judge Will's May 6, 1975 opinion is a careful exposition of the applicable standards governing a decision to stay and a detailed analysis of the reasons why a stay should be issued in the present case.

Judge Will, in the exercise of his judicial discretion, determined that retaining jurisdiction over Calvert's federal claims, but awaiting further developments in the state litigation before rendering a decision, was appropriate and that "in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative."

He continued: "The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the

1934 Act monetary damages question, but it also includes those issues underlying [American Mutual's] declaratory judgment action which are not present here. Accepting the fact that the state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna* [*State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970)], we find that Calvert's federal suit should be stayed pending disposition of the state court suit."

Judge Will also noted the need to avoid an "unseemly race to judgment with its concomitant harrassment and confusion." He concluded: "To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts."

He further noted: "While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here."

After attempts to secure reconsideration, Calvert petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus.

Opinion of the Court Below

Mandamus was granted by the court of appeals, relying exclusively on this Court's opinion in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). The court of appeals made clear that Judge Will's action had been entirely "correct" under existing Seventh Circuit law as

stated in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970), but held that the discretionary doctrine of *Aetna* had been overruled by *Colorado River*.

The opinion below states:

"The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction." 560 F.2d at 793.[5]

The court stated that under the existing Seventh Circuit rule of *Aetna State Bank* v. *Altheimer, supra*, which recognized "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," 430 F.2d at 755, Judge Will's stay order "was correct at the time it was entered," in May 1975. 560 F.2d at 795.

The court of appeals held, however, that the subsequent decision of this Court in *Colorado River Water Conservation District* v. *United States, supra*, overruled the *Aetna State Bank* case, eliminated the power of a district court to control its

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[5] The sole difference between the claims in the state court and the federal court relates to the allegations concerning Rule 10b-5 under the Securities Exchange Act of 1934.

In the state court, fraudulent representations in violation of Rule 10b-5 are alleged as a defense to the complaint, but no affirmative damages for violation of Rule 10b-5 are claimed. Instead, a two million dollar counterclaim for damages is based exclusively on supposed violations of other state and federal laws. In the federal court, a claim for two million dollars in damages is also alleged, based upon violation of Rule 10b-5 in addition to the other state and federal grounds alleged as bases for the two million dollars damages in the state court.

Accordingly, all issues relating to liability, including Rule 10b-5, are presented in the state court action, the only issue presented exclusively in the federal court being the extent of damages in the event liability under Rule 10b-5 is found to exist.

docket, and compelled the district court to undertake immediately its "obligation to exercise its jurisdiction." 560 F.2d at 795-97.

On the basis of this view, the court of appeals panel granted a writ of mandamus and ordered Judge Will as noted "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934." *Id.* at 797.

Four of the eight active judges on the court of appeals indicated a desire to have the matter submitted to the court *en banc*. Their views are set forth in note 5 to the opinion below. They said: "In simple terms, the panel's opinion holds that the rationale developed in *Aetna* [*State Bank* v. *Altheimer*] can no longer stand in the light of *Colorado River*. . . ." They stated: "the panel has apparently taken from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " a power these four judges believed to be based on this Court's opinion in *Landis* v. *North American Co.*, 299 U.S. 248 (1936). They regarded the rule of *Landis* and *Aetna* which the panel was abandoning as "a salutary rationale in the context of the overburdened federal courts." 560 F.2d at 796 n.5.

By granting the writ of mandamus, the panel held that the district court had a clear legal duty to proceed regardless of the pendency of the state proceeding, and accordingly had no discretion in the matter. For it is plain that mandamus as an extraordinary remedy will not lie with respect to the exercise of discretion, but only where the duty is not subject to discretion. It is available only in "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will* v. *United States*, 389 U.S. 90, 95 (1967).

Thus, the sole issue raised is whether a United States district judge has *any* discretion to stay proceedings in his court

when the identical parties are litigating the identical issues in a previously pending case in a state court. As noted, the court of appeals agreed that, if Judge Will had any discretion over his calendar, his decision to stay proceedings was "correct." Nevertheless, following what it believed to be the implications of the Court's decision in *Colorado River Water Conservation District* v. *United States, supra,* the court of appeals denied him any discretion and granted a writ of mandamus to compel him to reorder his calendar and immediately decide issues that otherwise might well become moot as a result of the pending state court litigation.

This Court's *Colorado River* Decision

The instant case is thus concerned exclusively with an interpretation given by the court of appeals to this Court's opinion in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). The opinion below expressly found that *Colorado River* overruled the discretionary power of federal district judges to stay proceedings in their courtrooms, a power heretofore recognized in *Aetna State Bank* as derived from *Landis* v. *North American Co.* However *Colorado River* concerned not a stay of proceedings, a mere postponement of judicial decision, but a final dismissal of a case within the jurisdiction of a federal court in favor of ongoing parallel state litigation.

In *Colorado River,* the United States had brought suit in federal court in its own behalf and on behalf of Indian tribes, seeking a declaration of water rights in the Colorado watershed. The district court dismissed the action, stating that the doctrine of abstention required deference to a comprehensive adjudication of water rights pending in a Colorado state court. 424 U.S. at 806. It was noted that federal policy as embodied in the McCarran Amendment, 43 U.S.C. § 666, opposed piecemeal adjudication of water rights, that the federal government was already involved in a number of other Colorado state water

rights adjudications, that no substantive proceedings had taken place in federal court, and that the federal courthouse was 300 miles from the water sources at issue. 424 U.S. at 820.

This Court held that, while the district court had improperly applied the abstention doctrine, it had acted properly in dismissing the federal action as a result of the balancing of a number of factors: While there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, dismissal is appropriate in "exceptional circumstances." The court concluded that:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942), and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v. *North American Co., supra*, at 254-255. Only the clearest of justifications will warrant dismissal." 424 U.S. at 818-19.

All the justices accepted this standard; the majority held that a balancing of these factors favored dismissing the federal court litigation, while three dissenters felt that the prerogative of district courts to dismiss actions should be more limited. No question was raised and no consideration was given by any of the justices, majority or minority, to the power of district judges to control the calendar of cases, and to stay federal proceedings without dismissing the case. Accordingly, no express statement was made concerning the rights of district courts to exercise the

inherent right to control their calendars in the interests of judicial economy and avoidance of duplicative litigation, where no order of dismissal is entered and jurisdiction is retained.

The panel below, however, stated that it saw no distinction between a stay and a dismissal. Applying the high standards required for dismissal by *Colorado River, i.e.*, exceptional circumstances, the panel below held that the standards had not been met and that no right to dismiss existed; therefore in its view no stay was permissable, the discretion to stay being limited to situations where dismissal was appropriate.

The *Colorado River* case having come before the appellate courts by appeal from a dismissal, no question either of the power to stay or of the use of the extraordinary writ of mandamus was involved, and there was no occasion for any discussion of those subjects.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. **Importance of the question.**

(a) The decision below fundamentally and grievously misconstrued this Court's opinon in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), with important adverse consequences to the fair and prompt administration of justice. The Seventh Circuit, in issuing a writ of mandamus directing Judge Will to decide "immediately" the issues in the case, denied the existence of any discretion by a district judge to stay a proceeding before him pending trial of the same issues between the same parties by a state court.

This is emphasized by the fact that the Seventh Circuit expressly stated that, under its earlier decisions acknowledging the existence of discretion, Judge Will's exercise of such discretion here would have been "correct."

The Seventh Circuit, in abandoning its own precedent and a consistent line of cases in this Court, relied exclusively on this

Court's decision in *Colorado River*. This Court in *Colorado River*, however, plainly did not intend to remove the discretionary powers of district judges to stay proceedings. In *Colorado River*, as shown above, the Court laid down standards under which a district judge may dismiss a case where related issues are in litigation in a state court. It did not deal with the district court's power to stay as distinct from its power to dismiss proceedings.

As four of the eight active judges of the Seventh Circuit Court of Appeals recognized in declaring their opposition to the panel's grant of mandamus, it is "difficult to think that the *Colorado River* language that '[o]nly the clearest of justification will warrant dismissal,' 424 U.S. at 819, and the other repeated references to dismissal, overlooked the technical, but significant, differences between a stay of proceedings and a dismissal." 560 F.2d at 796 n.5.

Moreover, even the standards the Court established in *Colorado River* for dismissal of an action clearly involve a discretionary authority on the part of the district judge. There is no indication that this Court's decision in *Colorado River* contemplated the removal of discretion and the propriety of a writ of mandamus even in the dismissal of actions in federal courts while similar actions are pending in state courts, much less in the stay of such actions.

(b) If the decision below is allowed to stand, *Colorado River* will have precisely the opposite effect to that clearly intended by this Court. Instead of sustaining the authority of district judges to avoid duplicative litigation, it will exterminate that authority.

As will be demonstrated below, this complete misreading of *Colorado River* will immediately affect severely the conduct of business in federal district courts in every part of the country. By denying district judges the authority to organize their dockets and schedule their judicial business in the most efficient and equitable manner, it will arm litigants with a simple

expedient for obtaining two trials and perhaps appeals of every federal claim, further burdening an already overburdened federal judiciary.

Unless this Court resolves the matter now, every United States district court and court of appeals may soon be confronted by litigants seeking the same opportunity to have their claims decided simultaneously by state and federal courts.

This Court should grant certiorari in the exercise of its power of supervision "because of the wide implications of the decision below for the orderly administration of . . . justice in the federal courts." *Will* v. *United States*, 389 U.S. 90, 95 (1967).

It has long been an underlying tenet of judicial administration that

> "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936).

This principle of *Landis* v. *North American Co.* has been followed for forty years without criticism. It was recently cited with approval by this Court in *Colorado River Water Conservation District* v. *United States, supra*, 424 U.S. at 817-19.

Colorado River did not purport to limit or question *Landis* v. *North American Co.* Indeed, the apparent holding of *Colorado River* was to extend the discretionary balancing doctrine of *Landis* in a limited class of cases beyond the context of stay orders to final dismissals.

Nevertheless, the panel of the Seventh Circuit Court of Appeals, without even the support of a majority of that court,

has interpreted *Colorado River* as overruling *Landis* v. *North American Co.*, and, as four members of the court below stated, "tak[ing] from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " 560 F.2d at 796 n.5 (emphasis in original).[6]

Under this interpretation, if a litigant brings identical claims in state and federal courts, so long as the federal claim is colorable, the federal court has no discretion to stay proceedings. Indeed, mandamus will lie to compel the district court to decide pending issues "immediately," even though those issues might be rendered entirely moot by state court proceedings already in a more advanced stage.

As indicated above, Judge Will's decision in the instant case involved only timing. He simply postponed decision of Rule 10b-5 issues, because of the possibility or even probability that the litigation in his court would become entirely moot as a result of the earlier filed parallel litigation being conducted in state court. He retained jurisdiction over all of Calvert's claims, and issued only a temporary stay. Calvert has not been denied its right to a federal forum.

If at some point Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, or if at the end of state court litigation Calvert's Rule 10b-5 claim had not become moot, Judge Will would then decide all issues before him in the light of wisdom gained from the state court proceedings. In the interim, he would be able to devote his resources to the claims of other litigants who have no alternate state court case through which to seek identical relief.

Indeed, the instant litigation presents a far stronger case for a stay than did *Landis* v. *North American Co.* In *Landis*, the

[6] The court of appeals did not address itself to the question of how a clear legal duty, enforceable by mandamus, could exist when the panel's construction of *Colorado River* was unable to attract the support of even a bare majority of the Seventh Circuit judges.

Court permitted a district court to stay proceedings pending the outcome of a case between *different* parties because it raised similar legal questions. In no event could the stayed litigation have been rendered moot as a result of the other case. But in the instant situation, the parties and the claims in the two cases are identical, all factual and legal issues raised in the two cases are identical, and the state court has authority to grant all requested relief, thereby creating a strong possibility that the federal case will ultimately be rendered moot.

Because the instant litigation presents an even clearer case for a stay than did *Landis*, the impact of the Seventh Circuit's misreading of *Colorado River* will be that much greater. The pendency of these identical lawsuits in state and federal courts was solely the result of Calvert's litigation strategy. It chose neither to remove the state litigation to federal court, nor to allow the state case to proceed to a conclusion first. By the simple expedient of filing two suits, it has endeavored to obtain two trials. Many other litigants with federal claims will be able to do the same. District judges will have no discretion to order their calendars to promote efficiency, but will be compelled "immediately" to decide issues already pending in state courts.

Rather than discouraging duplicative litigation, as this Court desired in *Colorado River*, the Seventh Circuit has guaranteed litigants two trials of any federal claim through the simple expedient of suing simultaneously in state and federal courts. This result was perceived by the court of appeals as the express command of this Court's *Colorado River* decision. Hence, the impact of the decision below will not be limited to district judges in the Seventh Circuit. Litigants throughout the United States will file suits simultaneously or successively in state and federal courts, and will cite *Colorado River* and the decision below as entitling them to two trials. Every United States court of appeals will soon be petitioned to issue writs of mandamus to enforce that entitlement. The result will be either a widening split among the courts of appeals, or further encouragement of dual litigation.

The impact on the district courts will be devastating. The reasonable discretion permitted by *Landis* v. *North American Co.* and extended by *Colorado River* has never been more essential than it is today. This Court is well aware of the current crisis resulting from the ever increasing caseload of the federal courts. In 1976, over 130,000 civil actions were commenced in the United States district courts, an increase of more than 11 percent over 1975. The Annual Report of the Director of the Administrative Office of the United States Courts 173 (1976). On June 30, 1976, over 4,000 civil actions were pending before the eleven judges in Judge Will's district, the Northern District of Illinois. *Id.* at 291.[7] There simply is not time for duplicate federal rulings on issues actively being litigated in state courts.

For example, in the present case, two Illinois courts, the Circuit Court of Cook County and the Illinois Appellate Court, have held that no security is involved in the reinsurance pool arrangement, and discretionary review is being sought from the Supreme Court of Illinois. Calvert is here seeking the view of Judge Will on this same point which, if unsatisfactory to it, will be brought to a fifth court, the Seventh Circuit, and then perhaps by both routes to this Court. This legal question has so dominated the litigation to date that neither party seems to have directed any attention to the issue on the merits whether Calvert was in fact, as alleged, misled when it entered the reinsurance pool.

[7] That district is currently operating with two fewer judges than the number now authorized by statute; legislation pending before Congress would add three more district judgeships. In the meantime, Judge Will's statistics reveal that he is busier than at any other time in his sixteen-year judicial career. Currently, 404 cases are pending before him. Ten years ago, his docket had been as low as 89 cases. Judge Will, today, is disposing of one and one-half times as many cases as in earlier years, forty or more per month, yet the backlog is growing.

This Court has recently made very clear that Rule 10b-5 must not be allowed to become a source of "vexatious litigation," federalizing state controversies and overriding state policies. *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 479 (1977); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 740 (1975). Yet the opinion below would encourage bringing vexatious Rule 10b-5 litigation simultaneously in two court systems to secure two adjudications.

Last month, in *General Atomic Co.* v. *Felter,* 46 U.S.L.W. 3289 (U.S. 1977), this Court reaffirmed summarily that state courts were without power to enjoin "vexatious and harassing" duplicative litigation in federal courts. This Court considered litigants to be protected, however, because "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment." *Id.* at 3291. Yet the opinion of the Seventh Circuit in the instant case would deny district courts that capability to control proceedings to prevent harassment and abuse. Indeed, the decision below would increase the likelihood of harassing duplicative litigation by compelling the federal district courts to decide "immediately" issues already being adjudicated in state courts. The obvious consequences to the proper administration of justice are so clearly adverse that prompt reversal is necessary.

Moreover, the Seventh Circuit's construction of *Colorado River* would fundamentally alter the relationship between the federal circuit and district courts, forcing the courts of appeals to become petty functionaries issuing extraordinary writs to control the docket and day-to-day schedules of district judges. Circuit judges have neither the authority, the experience, nor the resources to perform this task. The proper role of the courts of appeals has traditionally been to review the decisions of district courts for errors of law. 28 U.S.C. §§ 1291-94; *see, e.g.,*

Application of Edwards, 375 F.2d 108, 108 (2d Cir. 1967) (mandamus denied; "Courts of Appeals must stay within the appellate function assigned to them").[8]

It should be noted that the opinion below did not limit itself to Rule 10b-5 claims, over which federal courts have exclusive jurisdiction; its construction of *Colorado River* would force a district judge to decide immediately all issues in a federal case pending simultaneously in a state court.[9] Despite a district judge's admittedly correct decision about the fairest and most efficient way to order his docket, the court of appeals felt compelled by this Court's decision in *Colorado River* to use its mandamus power to determine in what order, and according to what schedule, cases should be heard and decided in the district court. *Cf. In re Josephson*, 218 F.2d 174, 177 (1st Cir. 1954) ("Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts"), *quoted, La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 267 (1957) (Brennan, J., dissenting).

Besides its serious impact, already noted, on district judges, this new responsibility would impose a significant new burden on the already overworked courts of appeals. In addition to more mandamus proceedings, the decision below will inevitably generate a whole new body of additional appeals from

[8] There have, of course, been particular instances of gross dereliction of duty by district judges which required the courts of appeals to exercise supervisory jurisdiction. *See, e.g., Natural Resources, Inc.* v. *Wineberg*, 349 F.2d 685, 692 (9th Cir. 1965) (district judge failed to render a decision on the "relatively simple" central issue of a lawsuit for more than four years; a "shocking situation"), *cert. denied*, 382 U.S. 1010 (1966). However, the opinion below has gone far beyond this limited supervisory jurisdiction. It has ruled that mandamus would issue despite the fact that Judge Will had exercised his discretion correctly.

[9] *See* 560 F.2d at 797 n. 6.

district court rulings on matters already decided by state courts. Yet the backlog of cases in the courts of appeals has also recently "skyrocketed." The Annual Report of the Administrative Office of the United States Courts 152-66 (1976). On June 30, 1976, over 14,000 appeals were pending. *Id.*

In short, as interpreted in the opinion below, this Court's decision in *Colorado River* would make sweeping changes in the structure of the federal judiciary and the conduct of judicial business. Such extreme consequences should not result from an erroneous interpretation of a Supreme Court decision by a court of appeals. We submit that the decision below, based solely on *Colorado River*, was so plainly erroneous, that this Court might reasonably decide to reverse summarily without full briefing or argument.

If in fact however it was the Court's intention to overrule *Landis* v. *North American Co.*, it should now do so clearly and expressly to proclaim this revolutionary new doctrine as the law for all inferior courts. As this Court noted once before, "[i]n such circumstances the call is plain for a decision that will mark with greater clearness the bounds of power and discretion. . . . [Certiorari should be] granted . . . that this result might be attained." *Landis* v. *North American Co., supra*, 299 U.S. at 254.

2. **Conflict among the circuits.**

In granting a writ of mandamus compelling Judge Will to decide "immediately" issues pending simultaneously in an earlier commenced action in a state court, the United States Court of Appeals for the Seventh Circuit "has rendered a decision in conflict with the decision of another court of appeals on the same matter," Sup. Ct. R. 19.1(b). Indeed, the law of the Seventh Circuit is now in potential conflict with that of at least two other federal judicial circuits. It is well-established in the Ninth Circuit that a federal court may exercise its discretion to grant a stay of proceedings when a case is pending in state court between the same parties in which the state court has

jurisdiction to decide all legal issues. *Lear Siegler, Inc.* v. *Adkins*, 330 F.2d 595 (9th Cir. 1964); *see Lecor, Inc.* v. *United States District Court for the Central District of California*, 502 F.2d 104, 105 (9th Cir. 1974). The Sixth Circuit Court of Appeals has held that mandamus does not lie to command a district judge to dissolve a stay order. *Jewell* v. *Davies*, 192 F.2d 670 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952). To be sure, these decisions predate this Court's *Colorado River* opinion. Nevertheless, they must be assumed to reflect current practice in the Ninth and Sixth Circuits. Unless the judges of these courts adopt the extraordinary construction of *Colorado River* followed by the court below, a construction that was unable to attract the support of a majority of the Seventh Circuit judges,[10] there will be an open conflict among the judicial circuits. Under traditional principles, a writ of certiorari should be granted to enable the Court to resolve these conflicts.

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[10] Indeed, because the eight active judges of the Seventh Circuit divided evenly on the correctness of the opinion below, there exists a critical conflict not only among the circuits, but within the Seventh Circuit itself, that can be resolved only if certiorari is granted.

CONCLUSION

For the reasons stated, the writ of certiorari should be granted and the writ of mandamus vacated. Allowing the writ of mandamus to stand threatens conflict among the circuits and confusion as to the meaning of this Court's ruling in the *Colorado River* case. Without clarification from this Court, *Colorado River* will be understood by an undeterminable number of lower courts as by the Seventh Circuit as a reversal of the essential discretion exercised for many years by trial judges in the control of their own calendars in the interest of a fair and efficient administration of justice. The resulting confusion would further burden the already overburdened federal courts. Prompt clarification is urgently required from this Court.

Summary reversal with a brief reaffirmance of *Landis* v. *North American Co.* is respectfully suggested as appropriate.

Respectfully submitted,

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Dated: November 14, 1977

APPENDIX I

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 76-1495
CALVERT FIRE INSURANCE COMPANY,

Plaintiff-Petitioner,

v.

HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Defendant-Respondent.

On Petition for Writ of Mandamus.
No. 75 C 103—Hubert L. Will, *Judge*

ARGUED SEPTEMBER 16, 1976—DECIDED AUGUST 15, 1977

Before SWYGERT and WOOD, *Circuit Judges,* and GRANT, *Senior District Judge.*[1]

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[1] The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana is sitting by designation.

SWYGERT, *Circuit Judge*. The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction. The question forms the basis for a petition for a writ of mandamus against United States District Judge Hubert L. Will of the Northern District of Illinois. We grant the writ.

Plaintiff-petitioner Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool." Fire and casualty policies underwritten by primary insurance companies are reinsured by American Mutual which in turn lessens its reinsurance risks by enlisting other insurance companies to enter into a pool arrangement. These companies earn a pro rata share of the excess of American Mutual's premiums over the sum of losses paid primary insurers and a management fee. If losses exceed premiums the pool members are obligated to indemnify American Mutual.

Calvert is a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials during which Calvert asserts it sought financial data from American Mutual. Although apparently available, the data was not furnished. In March 1974 Calvert received from American Mutual its first statement which reflected extremely high reserves for incurred but not reported losses for the months of January and February 1974. In April American Mutual's 1973 annual report showed an inordinately high loss and expense ratio. Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool because of American Mutual's withholding of material information during the negotiation of the agreement. Calvert notified American Mutual that it intended to rescind its agreement to

participate in the pool. Simultaneous litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert* Circuit Court of Cook County, Illinois	*Calvert* v. *American Mutual* United States District Court for the Northern District of Illinois
July 3, 1974 American Mutual sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.	
January 10, 1975 Calvert filed an answer alleging that the agreement was void because American Mutual violated the 1933 Securities Act, the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.	January 10, 1975 Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as for alleged violations of Rule 10b-5 of the Securities Exchange Act.
With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act.	

On February 5, 1975 American Mutual moved to abate or, in the alternative, to dismiss the federal court action. The

abatement motion was based on the fact that six months previously American Mutual had initiated its declaratory judgment action in the Circuit Court of Cook County. The motion to dismiss was based on American Mutual's contention that the reinsurance contract executed by the parties did not constitute a sale by American Mutual of a security under either the Securities Act of 1933 or the Securities Exchange Act of 1934.

On May 6, 1975 Judge Will issued a memorandum opinion and order on American Mutual's motion to abate. The order stayed all claims alleged in Calvert's complaint, except its claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The district court's jurisdiction over the latter claim was specifically retained by the terms of the order. On May 9, 1975 Judge Will heard oral argument on the primary issue underlying the claim for damages: whether a participatory interest in the reinsurance pool is a security? The judge has not ruled on this issue.

On June 16, 1975 the judge in the state court declaratory judgment action ruled that participatory interests in the reinsurance pool are not securities and that application of the federal securities laws was barred by the McCarren-Ferguson Act, 15 U.S.C. §1101-05. Calvert appealed from this ruling to the Illinois Appellate Court, which affirmed the trial court's decision.

On two occasions subsequent to the abatement order Calvert requested the district judge to reconsider his order. He refused the requests, and also refused to rule on the claim for damages under Rule 10b-5 over which he retained jurisdiction. He has declined to permit interlocutory review of his order.

Calvert recognizes that the district court's order staying proceedings on most of Calvert's federal complaint is not appealable because it is not a final order. *See Cotler* v. *Inter-County Orthopaedic Ass'n, P.A.*, 526 F.2d 537, 540 (3d Cir. 1975). It therefore seeks review of the district court's action by petitioning for a writ of mandamus. In its petition it asks us to

require Judge Will to adjudicate its entire claim—both for equitable relief and for damages—under the Securities Exchange Act of 1934.[2] Calvert is therefore partially seeking reversal of the district court's decision to stay Calvert's claim for equitable relief and partially seeking an order compelling Judge Will to immediately decide the claim for damages over which he has retained jurisdiction.[3]

I

A writ of mandamus is an extraordinary remedy which we will not easily grant. In a fairly recent case, *Will* v. *United States*, 389 U.S. 90, 96 (1967), the Supreme Court advised the lower federal courts: "[t]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is clear and indisputable'" (citation omitted). With these preliminary observations in mind, we turn to the merits of the petition.

II

The district court relied principally upon this court's decision in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970). In *Aetna* the district court stayed an action brought under Rule 10b-5 in deference to state court proceedings involving the same transaction in which the identical Rule 10b-5 claim was raised as an affirmative defense. We sustained the district court's action, holding that the stay was a proper exercise of "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." 430 F.2d at 755.

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[2] The petition does not mention the claims for equitable and monetary relief under the Securities Act of 1933 or state law contained in Calvert's federal complaint.

[3] Calvert's position is that: "Although Judge Will's Opinion states that Calvert's Rule 10b-5 claim is 'viable,' his subsequent rulings have, in effect, stayed that claim as well."

The district court's reliance on *Aetna* was not misplaced. Although Calvert struggles to distinguish the case at bar from *Aetna*, the factual parallelism between the two cases is overwhelming. Thus, the district court's order was correct at the time it was entered.

Since that time, however, the Supreme Court has decided *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), in which it thoroughly analyzed the law with respect to contemporaneous exercise of concurrent jurisdiction by state and federal courts. If *Colorado River* controls the instant case, we must apply it even though it was decided after the district court had acted. *United States* v. *Fitzgerald*, 545 F.2d 578, 581-82 (7th Cir. 1976).

In *Colorado River* the Supreme Court stated that, in cases of contemporaneous exercise of concurrent jurisdiction by a state court and a federal court, the federal court generally has an obligation to exercise its jurisdiction. The Court reaffirmed the rule of *McClellan* v. *Carland*, 217 U.S. 268 (1910), that the pendency of a state court action is not a bar to an action in a federal court involving the same issues. It held that only in exceptional circumstances should a federal court dismiss an action because of the pendency of state proceedings involving the same issues. Circumstances which might lead to such a dismissal include: (1) the assumption of jurisdiction over a *res* by the state court; (2) the desirability of avoiding piecemeal litigation; (3) the inconvenience of the federal forum; and (4) the order in which concurrent jurisdiction was obtained by the two forums. None of these factors alone is determinative and "[o]nly the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 819.

After making it clear that only exceptional circumstances would ever warrant deference to a state court in cases of concurrent state and federal jurisdiction, the Court found such circumstances in *Colorado River*. In that case the United States brought an action in federal court asserting water right claims.

One of the defendants attempted to make the United States a party to a state action in order to adjudicate all of the Government's claims. The most important factor warranting dismissal of the federal action was the existence of the McCarran Amendment, 43 U.S.C. § 666, providing for consent to join the United States in a state suit for adjudication or administration of water rights. The federal policy evinced by that amendment was one of avoiding piecemeal litigation and the disruption of a complicated and extensive system of state allocation and adjudication of water rights, such as the one employed by the State of Colorado.

The instant case differs from *Colorado River* in that the district court did not dismiss Calvert's federal action. Instead, it stayed[4] all but the claim for damages under Rule 10b-5, over which it retained jurisdiction but refused to decide. We do not find this distinction to be important. It is clear that the district court, acting properly under *Aetna*, intended to defer on grounds of federalism to the result reached in the state proceedings. Thus, the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case. We therefore hold that *Colorado River* is applicable and turn to a determination of whether the exceptional circumstances which *Colorado River* requires in order to justify federal deference to state proceedings are present.

We do not find any exceptional circumstances in the instant case. The federal forum was not inconvenient for the

[4] The district court granted American Mutual's motion to "abate," but stated specifically that it was "staying" all but the Rule 10b-5 damages claim. In *Aetna*, we defined abatement "as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way." 430 F.2d at 754. We assume that Judge Will meant to use "stay" as a synonym for "abate."

parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings.

The rationale developed in *Aetna* can no longer stand in light of the Supreme Court's decision in *Colorado River*. *Aetna* therefore is overruled as the law of this circuit.[5]

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[5] This opinion has been circulated among all judges in regular active service. A majority of the judges did not favor rehearing *en banc* on the question of overruling *Aetna*.

Circuit Judge Pell, however, filed the following statement in which Chief Judge Fairchild and Circuit Judges Tone and Bauer joined:

The panel's opinion in this case was circulated to all judges of the court in regular active service. Four of the eight judges voted to rehear the case *en banc* insofar as it overruled *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970). In simple terms, the panel's opinion holds that the rationale developed in *Aetna* can no longer stand in the light of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). In overruling *Aetna*, as opposed to finding that that case was good law but that the district court had abused its discretion in granting a stay of the federal litigation, the panel has apparently taken from the district court the *power* to stay proceedings as "incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants." *Aetna*, 430 F.2d at 755. Under *Aetna*, "[h]ow this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Id.*

These principles announced in *Aetna* were not particularly new. The foregoing extracts from *Aetna* relied upon *Landis* v.

North American Co., 299 U.S. 248 (1936), which case ironically, is cited in *Colorado River*, 424 U.S. at 818-19, for much the same proposition. Indeed, the matter of a federal stay when a similar action between the same parties is pending in a state court is not itself a new problem. See the extensive 136 page Annotation, Stay of Action in Federal Court Until Determination of Similar Action Pending in State Court, 5 ALR Fed. 10 (1970).

It would seem that the judicial demise of the rationale of *Aetna*, a salutary rationale in the context of the overburdened federal courts, would warrant *en banc* reconsideration at the very least, bearing in mind that during the seven years of *Aetna's* viability it has been followed and relied upon here and elsewhere and that its application would at most assume the form of a discretionary stay and not a dismissal as in *Colorado River*. In that case, of course, the Court upheld the dismissal of the federal action.

It is difficult to think that the *Colorado River* language that "[o]nly the clearest of justification will warrant dismissal," 424 U.S. at 819, and the other repeated references to dismissal, overlooked the technical, but significant, differences between a stay of proceedings and a dismissal. In applying *Aetna*, this court has made it clear that "a stay of the federal proceedings is the appropriate response rather than a dismissal of the complaint." *Weber* v. *Consumers Digest, Inc.*, 440 F.2d 729, 732 (7th Cir. 1971).

Unfortunately for the continued availability to district court judges of the *Aetna* concept of the weighing of competing interests, the posture of the case before the *Calvert* panel, that of a petition for mandamus, precluded a review of the discretionary stay granted below. The *Calvert* panel unnecessarily, it would appear, found itself in the Hobson's choice position because of its agreement with the petitioner that the stay order was not appealable. The result, however, is inconsistent with prior authority in this circuit to the effect that there is appellate jurisdiction for review of stay orders, *Drexler* v. *Southwest DuBois School Corporation*, 504 F.2d 836, 838 (7th Cir. 1974) (en banc); *accord*, *Vickers* v. *Trainor*, 546 F.2d 739, 741 (7th Cir. 1976), neither of which the panel adverted to nor purported to overrule. See also Note, *Appealability of Abstention Orders*, 10 Ind. L. Rev. 556, 565 (1977). It would seem to be a matter of regret that the important issue here involved was resolved in the context of allowing the extraordinary writ of mandamus to serve as a substitute for an appeal.

We conclude that the district court should neither have delayed the adjudication of Calvert's Rule 10b-5 claim for damages nor stayed Calvert's other federal claims. Accordingly, we grant the writ of mandamus and order the district court to proceed immediately with Calvert's claim for damages and equitable relief under the Securities Exchange Act of 1934.[6] We need not decide whether the state proceedings between Calvert and American Mutual, if they are now concluded, would be *res judicata* as to those portions of Calvert's federal complaint which the district court had stayed and which we are now ordering it to reinstate. Nor need we reach the difficult issue of whether the conclusion of the state proceedings would have a collateral estoppel effect on the Rule 10b-5 claim for damages over which the court had retained jurisdiction but declined to resolve. What we are deciding is that the district court should not have deferred to the state court on grounds of federalism in light of *Colorado River*.

The petition for a writ of mandamus is granted and the writ shall issue forthwith.

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[6] As we have already noted, Calvert's petition did not refer to its claim under the Securities Act of 1933 which the district court had stayed. *See* note 2 *supra*. The logic behind our holding in this case supports the conclusion that the stay of 1933 Act claims, as well as the 1934 Act claims, was improper. Although we will not order the district court to immediately decide the 1933 Act claims because the issue is not before us, the district court should consider revoking the stay of the 1933 Act claims if Calvert moves for such relief.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

v.

AMERICAN MUTUAL REINSURANCE CORPORATION, an Illinois corporation,
Defendant.

75 C 103

MEMORANDUM OPINION

The plaintiff, Calvert Fire Insurance Company (Calvert), brings this action against American Mutual Reinsurance Corporation (Amerco), seeking rescission of a reinsurance pool agreement, or, in the alternative, monetary damages, for alleged violations of (1) section 12(1) of the Securities Act of 1933; (2) section 10(b) of the Securities and Exchange Act of 1934; (3) section 137.12(G) of the Illinois Security Law; (4) section 34(a)(2) of the Maryland Securities Act; and (5) for common law fraud. Federal jurisdication is founded upon §22(2) of the 1933 Securities Act, §27 of the 1934 Securities Act, and diversity of citizenship, 28 U.S.C. §1332.

The defendant moves to abate the instant proceedings, giving preference to a now pending state court action in the Circuit Court of Cook County, Illinois, involving the same parties and the same general issues, or, in the alternative, to dismiss on the ground that the reinsurance agreement does not constitute a security under the federal securities acts. We do not

reach the securities question at this time, but, for the reasons set forth hereinafter, we will stay those aspects of the instant suit which are concurrently before both courts.

FACTS

Calvert is a Pennsylvania corporation engaged in the writing of property and casualty insurance. Amerco is an Illinois corporation engaged solely in the business of reinsurance. In order to expand its reserves, thereby increasing the volume of its business, Amerco has since 1947 organized, sponsored, and administered a reinsurance pool known as the Multiple Line Pool. The approximately 100 insurance companies which participate in this pool stand to benefit by receiving an agreed percentage of the excess premiums earned over losses paid to primary insureds, less management fees. Conversely, in the event that the losses exceed premiums less management fees, the participants are obligated to indemnify Amerco. This process of profit and loss sharing is referred to in insurance parlance as the quota share method of retrocession.

In the spring of 1973, an executive of Amerco contacted Calvert soliciting its participation in the pool. Thereafter, negotiations took place between the parties culminating in early 1974 with the execution by Calvert of a Multiple Line Reinsurance Agreement. Calvert contends that, during the negotiation period, it continually sought statistics regarding Amerco's performance during 1973 but this information was never forthcoming. Calvert further claims that Amerco never suggested that it was experiencing economic difficulties or that it anticipated changing its accounting methods or method of reserving for losses.

Late in March of 1974, Calvert received its first statement from Amerco concerning Calvert's share in the premiums and losses reflecting extremely high reserves for incurred but not reported losses for the period January-February 1974. Immediately thereafter, in April 1974, Calvert received Amerco's 1973

Annual Report which indicated an inordinately high loss and expense ratio. Greatly surprised by the pool's substantial losses for which it now found itself pro rata accountable, Calvert concluded after inquiry that it had been fraudulently induced to participate in the pool by reason of Amerco's failure or refusal to disclose information known to it prior to the execution of the agreement. Claiming that it would not have entered the agreement had it known the true financial condition of the pool or of Amerco's decision to alter its methods of accounting or its reserves, Calvert notified Amerco on April 19, 1974 that it had elected to rescind its participation in the pool.

In response, Amerco filed suit in the Circuit Court of Cook County on July 3, 1974, seeking declaratory relief finding the pool agreement to be in full force and effect, and ordering Calvert to participate in the losses for calendar year 1974, in accordance with the terms of the agreement. On January 10, 1975, Calvert filed its answer and counterclaim in the state court action and, on the same date, filed the instant suit here. Included in Calvert's state court responsive pleading are a number of "affirmative defenses" seeking rescission of the pool agreement under (1) the 1933 Securities Act; (2) the 1934 Securities Exchange Act; (3) the Illinois Securities Law; (4) the Maryland Security Act; and (5) common law fraud. Calvert's state court counterclaim, which seeks monetary damages in the amount of $2,000,000, asserts all of these same grounds with the exception of the 1934 Act. The action before us seeks rescission or, in the alternative, monetary damages upon all five grounds enumerated above. The only substantive difference between Calvert's responsive pleadings in the state court and its complaint in this suit is the absence of a 1934 Act claim for money damages in Calvert's state court counterclaim.

MOTION TO ABATE

On February 5, 1975, Amerco filed its motion to abate the proceedings before this court. In support of its motion, Amerco

relies principally upon the Seventh Circuit Court of Appeals decision in *Aetna State Bank* v. *Altheimer,* 430 F.2d 750 (1970), wherein the court found that the trial court did not abuse its discretion by staying proceedings pending disposition of a state court action between the same parties and embracing the same issues. In reaching its decision, the Seventh Circuit stressed the salutary principle that courts are vested with the power to control the disposition of cases on their dockets with economy of time and effort for themselves, for counsel, and for litigants. Thus, while a federal court is not required to stay a case pending the outcome of an identical state court action, sound principles of judicial administration may warrant the court exercising its discretion in appropriate circumstances to avoid unnecessary duplication of judicial effort, possible conflicting results, or the perplexing questions of *res judicata. Aetna, supra,* at 755, 758. So long as the state court has jurisdiction, and the stay is not foreclosing a litigant from the preemptive jurisdiction of the federal courts, confining issues before a single forum has been recognized as an acceptable method for dealing with burdensome and repetitious litigation which places an added burden on the burgeoning dockets of both state and federal courts.

In its discussion of those factors which should be taken into account when determining whether, on balance, a stay is warranted, the Seventh Circuit discounted the notion that the priority of initiation was the controlling factor. Although worthy of some significance, the court stressed that "the doctrine of abstention should have greater flexibility than would be indicated by blind and routine adherence of the matter of priority of litigation." *Aetna, supra* at 758. Other factors which the court felt should be considered included, "the totality of the issues before the respective courts, the convenience of the parties, the prospect of early completion of the litigation, and any other aspects which might bear upon the fairness of litigation to all concerned." *Aetna, supra* at 758.

Applying these general guidelines to the factors present here, we find that, in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative. The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the 1934 Act monetary damages question, but it also includes those issues underlying Amerco's declaratory judgment action which are not present here. Accepting the fact that the state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna,* we find that Calvert's federal suit should be stayed pending disposition of the state court suit.

In opposition to Amerco's motion to abate, Calvert has offered three separate arguments, none of which we find to be persuasive. Essentially, Calvert contends:

1. This court's jurisdiction has been invoked under Section 27 of the 1934 Act which is a grant of *exclusive* jurisdiction to federal courts;

2. Abstention is not appropriate since the paramount issues in the instant suit arise under federal not state law;

3. Amerco has manifested a clear preference for an adjudication of the issues raised by its motion before this Court.

The same argument regarding the exclusivity of a 1934 Act claim was disposed of in *Aenta,* where, as here, 10b-5 was raised as an affirmative defense. The court stated at p. 754:

> The Bank strenuously contends that abatement of the action was impermissible because Congress has granted to the federal courts exclusive jurisdiction over violations of the Securities Exchange Act. We concede the correctness of this position in so far as the initiation of an action founded on the federal statute in question. However, the matter can be litigated in the state court action involving these parties. The original brief filed by the Bank quotes Professor Loss to the effect that even if it be assumed that the act precludes a state court from entertaining an action in so far as relief is sought, "nothing in that section prevents the state court from considering questions * * * which are introduced by way of defense, and failure to do so would violate the supremacy clause." II Loss, Securities Regulation 977 (1961).
>
> Professor Loss points out that the Supreme Court of Delaware had reached the opposite position. However, the author feels on the basis of a number of analogous situations that there is no question that the refusal of a state court to entertain a defense of federal illegality is a graver error than its refusing to accept jurisdiction which is given it over federal claims.

The Seventh Circuit's interpretation of the 1934 Act has been followed with approval by other courts which have held that the situation wherein the state possesses concurrent jurisdiction to entertain defenses arising under the 1934 Act is neither unique nor offensive to the traditional notions of federalism, preemption, or supremacy. *Hampton House Management Corp.*

v. *Saleh,* 357 F.Supp. 591 (S.D.N.Y. 1973). Accord, *Shareholders Management Co.* v. *Gregory,* 449 F.2d 326 (9th Cir. 1971).

Notwithstanding, the plaintiff, relying principally upon *Movielab, Inc.* v. *Berkey Photo, Inc.,* 321 F.Supp. 806 (S.D.N.Y. 1970), urges that the state court does not have jurisdiction over the 1934 Act claim. If Calvert had raised a claim for money damages in its counterclaim, we would agree that would be in the nature of a cause of action originating under the 1934 Act and therefore subject to the exclusive jurisdiction of the federal court.[1] Calvert, however, has conspicuously omitted the 1934 Act from its state court counterclaim. The only reference to the 1934 Act is in Calvert's affirmative defenses seeking rescission of the agreement. Such relief, in response to a declaratory action seeking enforcement of the agreement, is clearly in the nature of a defense; it does not seek to affirmatively recover anything from the plaintiff, it is merely a means of escaping liability under the contract. So characterized, Calvert's affirmative defense comes within the scope of *Aenta,* and, therefore, the state court has concurrent jurisdiction to adjudicate the 1934 Act claim raised by way of defense.

Calvert further argues that, since *Aenta* involved "repetitive litigation" filed by the same party as the plaintiff in each court, while here the defendant-counterclaimant in the state suit is the plaintiff in this court, *Aenta* is distinguishable. Calvert's contention was rejected by the Ninth Circuit in *Shareholders Management Co.* v. *Gregory, supra* at 327, where the court found *Aenta* to be applicable to "reactive litigation" as well. In *Gregory,* the plaintiffs in the federal action sought declaratory relief adjudicating a federal defense to an action filed against them in a California state court. The court, relying on *Aenta*

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[1] For a thorough examination of the state court's lack of subject matter jurisdiction over 10b-5 counterclaims, see Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place For a Private Right,* 68 Nw. U.L. Rev. 44, 65 (1973).

found "no jurisdictional barrier to the state court's entertaining and adjudicating the merits of appellants' defense based on the interpretation of the Securities Exchange Act of 1934."

Regardless of its litigating posture in these two cases, Calvert is responsible for raising substantially the same claims in both courts. As would be the case if this were repetitive litigation, the same elements of duplication of effort and extra burden to the courts are present. As Professor Vestal concluded in his scholarly work dealing with reactive litigation, the press of litigation facing the courts highlights the need to curtail or eliminate unnecessary reactive litigation, not only to conserve judicial manpower but also to avoid the unseemly race to judgment with its concomitant harrassment and confusion. Vestal, *Reactive Litigation,* 47 Iowa L. Rev. 11 at 28 (1961). Accepting reactive litigation as merely another form of duplicative litigation imposing similar burdens upon the courts and litigants, we find the positioning of Calvert as defendant-counterclaimant in the state suit and plaintiff here to be of little consequence, and not to preclude our exercise of discretion permitting the state court to adjudicate the 1934 Act defense.

Nor are we persuaded by Calvert's suggestion that we should assume jurisdiction because the paramount issues are federal in nature. While we agree that, all things being equal, federal courts are the preferred forum for considering securities questions arising under federal law, the Seventh Circuit in *Aenta* stressed a corresponding need for judicial economy. Since this is a question of discretion and not jurisdiction, we find, as in *Aenta* that confining all of the issues before the state court is preferable to simultaneous consideration by both courts of all issues, both state and federal.

Finally, we find little merit in Calvert's suggestion that, because Amerco chose to brief the securities question as an alternative to its motion to abate, it opted for the federal court to decide that issue. We do not read anything more into Amerco's motions than presenting an alternative contingency

argument in the event it did not prevail on the abatement question. Amerco's reply brief expressly states that we need not reach the question of whether the agreement constituted a security if its motion to abate is granted.

While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here.

To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts. This leaves only Calvert's very limited claim for monetary damages under the 1934 Securities Act as a viable claim in this court. An order consistent with the foregoing will enter.

.....

United States District Judge

Dated: May 6, 1975

B1-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Hubert L. Will

Cause No. 75c103 Date May 6, 1975

Title of Cause *Calvert Fire Ins. Co.* v. *American Mutual Reinsurance Corp.*

Brief Statement of Motion .....

.....

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

.....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent .....

.....

.....

.....

Reserve space below for notations by minute clerk

Pursuant to Court's memorandum opinion this day filed; order all aspects of Calvert's federal action which are pending before both courts are stayed. This leaves only Calvert's very limited claim for monetary damages under the 1934 Securities Act as a viable claim in this court.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX 3

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool,

Plaintiff,

No.

-vs-

EXTRAORDINARY REMEDY

CALVERT FIRE INSURANCE COMPANY,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Now comes the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, sometimes referred to herein as AMRECO, Individually, and for the use of ALL AMERICAN INSURANCE COMPANY, ALLENDALE MUTUAL INSURANCE COMPANY, ALL-STAR INSURANCE COMPANY, AMBASSADOR INSURANCE COMPANY, AMERICAN CONTINENTAL INSURANCE COMPANY, AMERICAN HARDWARE MUTUAL INSURANCE COMPANY,

AMERICAN HOME ASSURANCE COMPANY, AMERICAN MUTUAL FIRE INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE AMERICAN STAR INSURANCE COMPANY, ARGONAUT INSURANCE COMPANY, ASSOCIATED MUTUAL INSURANCE COMPANY, AUDUBON INSURANCE COMPANY, AUSTIN MUTUAL INSURANCE COMPANY, BENEFICIAL FINANCIAL INSURANCE COMPANY, CAMERON MUTUAL INSURANCE COMPANY, THE CAPITAL FIRE INSURANCE COMPANY, CASUALTY RECIPROCAL EXCHANGE, CENTRAL MUTUAL INSURANCE COMPANY, CITIZENS MUTUAL INSURANCE COMPANY, CITIZENS SECURITY MUTUAL INSURANCE COMPANY, CLEARFIELD INSURANCE LIMITED, THE COLLEGE/UNIVERSITY INSURANCE COMPANY, COLUMBIA MUTUAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, CONSOLIDATED MUTUAL INSURANCE COMPANY, COTTON STATES MUTUAL INSURANCE COMPANY, DRUGGISTS MUTUAL INSURANCE COMPANY, ELITE INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INS. CO. OF WISCONSIN, EXCHANGE MUTUAL INSURANCE COMPANY, FARMERS HOME MUTUAL INSURANCE COMPANY, FARMERS MUTUAL HAIL INS. CO. OF COLUMBIA, MO., FEDERATED MUTUAL INSURANCE COMPANY, FINANCIAL FIRE & CASUALTY COMPANY, FREMONT MUTUAL INSURANCE COMPANY, GENERAL FIRE & CASUALTY COMPANY, GRINNEL MUTUAL REINSURANCE CORPORATION, THE HAMILTON MUTUAL INSURANCE CO. OF CINCINNATI, HARFORD MUTUAL INSURANCE COMPANY, THE HARTFORD STEAM BOILER INSPECTION & INS. CO., HAWAIIAN INSURANCE & GUARANTY CO., LTD., HINGHAM MUTUAL FIRE INSURANCE COMPANY, INDEPENDENT FIRE INSURANCE COMPANY, INTEGRITY INSURANCE COMPANY, INTEGRITY MUTUAL INSURANCE

COMPANY, INTERBORO MUTUAL INDEMNITY INSURANCE COMPANY, INTERSTATE INSURANCE COMPANY, IOWA MUTUAL INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, MANCHESTER INSURANCE & INDEMNITY COMPANY, MANUFACTURERS & MERCHANTS MUTUAL INS. CO., MERCHANTS MUTUAL INSURANCE COMPANY, MERRIMACK MUTUAL FIRE INSURANCE COMPANY, MFA MUTUAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, MIDDLESEX MUTUAL ASSURANCE COMPANY, MIDDLESEX MUTUAL INSURANCE COMPANY, MIDLAND INSURANCE COMPANY, MIDLAND UNION INSURANCE COMPANY, MILBANK MUTUAL INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INS. CO. OF TEXAS, THE MONARCH INSURANCE COMPANY OF OHIO, MORRISON ASSURANCE COMPANY, INC., THE MUTUAL FIRE, MARINE & INLAND INSURANCE CO., NEW HAMPSHIRE INSURANCE COMPANY, NORTH EAST INSURANCE COMPANY, OLD GUARD MUTUAL INSURANCE COMPANY, OLD RELIABLE FIRE INSURANCE COMPANY, OREGON MUTUAL INSURANCE COMPANY, PENNSYLVANIA MANUFACTURERS ASSOC. INS. CO., PENNSYLVANIA MILLERS MUTUAI INSURANCE COMPANY, PHILADELPHIA MANUFACTURERS MUTUAL INS. CO., PROTECTION MUTUAL INSURANCE COMPANY, THE PROVIDENCE MUTUAL FIRE INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INSURANCE COMPANY, RURAL MUTUAL INSURANCE COMPANY, SASKATCHEWAN GOVERNMENT INSURANCE OFFICE, SECURITY INSURANCE COMPANY OF HARTFORD, THE SHELBY MUTUAL INSURANCE CO. OF SHELBY, OHIO, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY, STONEWALL INSURANCE

COMPANY, THE SUSSEX MUTUAL INSURANCE COMPANY, THOMAS JEFFERSON INSURANCE COMPANY, TRANSNATIONAL INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNION INSURANCE COMPANY, UNITED AMERICA INSURORS, UNITED FARM BUREAU MUTUAL INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, UTICA MUTUAL INSURANCE COMPANY, WEST BEND MUTUAL INSURANCE COMPANY, WESTERN NATIONAL MUTUAL INSURANCE COMPANY, WILSHIRE INSURANCE COMPANY, WISCONSIN FARMERS MUTUAL INSURANCE COMPANY, YOSEMITE INSURANCE COMPANY, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and complaining of the defendant, CALVERT FIRE INSURANCE COMPANY, states onto the Court as follows:

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and at all times mentioned herein, was in the business of reinsuring property and casualty risks and organizing and managing a reinsurance pool consisting of property and casualty insurance companies herein above identified.

2. Defendant, CALVERT FIRE INSURANCE COMPANY, is a corporation licensed to do business by virtue of the laws of the State of Illinois, and at all times mentioned herein, was in the business of writing property and casualty insurance and participating in various reinsurance pools and arrangements.

3. Pursuant to plaintiff's business as a reinsurer of risks, numerous property and casualty insurance companies offer portions of risks from property and casualty insurance policies to plaintiff.

4. The aforesaid insurance companies thereby take advantage of the initial benefits of plaintiff's reinsurance

program by reinsuring portions of insurance policies with plaintiff, and, as consideration therefore, plaintiff is paid a portion of the premium charged for such policies.

5. In return for the possibility of realizing an underwriting profit, plaintiff reinsures and accepts the aforesaid portions of risks and premiums which were originally accepted by the property and casualty insurance companies through sales of insurance policies.

6. Plaintiff's acceptance of portions of risks from the original vendors of property and casualty insurance policies is by written reinsurance contract, committing plaintiff to share in their losses which occur while such reinsurance contracts are in force.

7. As a form of risk-assuming activity in the hope of profit, various property and casualty insurance companies participate in plaintiff's reinsurance pool.

8. The aforesaid participants share in plaintiff's reinsurance pool by accepting portions of the risks and premiums assumed by plaintiff under its reinsurance contract.

9. Pursuant to the aforesaid arrangement, defendant, CALVERT FIRE INSURANCE COMPANY, a corporation, entered into a written agreement with the plaintiff, a copy of said agreement being attached hereto and incorporated herein as plaintiff's Exhibit "A".

10. The duration of the aforesaid agreement is found in Paragraph Ten thereof;

"TERM

This agreement shall apply to all contracts written or renewed by the company to become effective on or after January 1, 1974, and shall remain in force continuously until terminated at the close of any December 31, by either party giving to the other six months' prior notice in writing.

However, in the event of such termination the Participant shall remain liable hereunder for its share of losses and expenses resulting from losses or occurrences which happen prior to such termination."

11. On April 22, 1974, defendant requested termination of the aforesaid agreement pursuant to letter and telegram, copies of said documents being attached hereto and incorporated herein as plaintiff's Exhibit "B" and "C", respectively.

12. Plaintiff has agreed to terminate the aforesaid agreement at its earliest possible termination date, December 31, 1974, and has repeatedly requested that defendant honor the contractual obligations assumed by the defendant for the period from January 1, 1974, through December 31, 1974, pursuant to letters, copies of which are attached hereto and incorporated herein as plaintiff's Exhibits "D" and "E", respectively.

13. Defendant contends it is not bound by any portion of the aforesaid agreement by reason of its telegram, Exhibit "C", requesting retro-active termination and for other reasons unknown to plaintiff.

14. Plaintiff contends defendant is bound by the aforesaid agreement for the minimum participation period provided, i.e. January 1, 1974, through December 31, 1974, and that defendant must participate in premiums and losses attributable to the aforesaid period.

15. An actual controversy exists between the plaintiff and the defendant, and by the terms and provisions of Section 57.1 of the Civil Practice Act of the State of Illinois, this Court is invested with the power to declare the rights and liabilities of the parties hereto, and to give such other further relief as may be necessary in the premises.

WHEREFORE, the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, prays:

1. That this Court determine and adjudicate the rights and liabilities of the parties hereto with respect to the reinsurance participating agreement herein above described and attached as plaintiff's Exhibit "A".

2. That this Court find and declare that the aforesaid agreement entered into between plaintiff and defendant is in full force and effect between the parties, and that the defendant is obligated to participate in premiums and losses as set forth in the agreement between the plaintiff and the defendant attributable to the period of January 1, 1974, through December 31, 1974.

3. That this Court grant such other and further relief as it deems fit and proper under the evidence and circumstances.

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER

By: _____
Attorneys for the Plaintiff

69 West Washington Street—Suite 2700
Chicago, Illinois 60602
630-4400

APPENDIX 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMERICAN MUTUAL REINSURANCE COMPANY, individually and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool,

Plaintiff,

No. 74 L 10737
EXTRAORDINARY
REMEDY

vs.

CALVERT FIRE INSURANCE COMPANY,

Defendant.

ANSWER AND COUNTERCLAIM

Now comes the defendant, CALVERT FIRE INSURANCE COMPANY ("Calvert"), by its attorney, Michael L.

Weissman of Aaron, Aaron, Schimberg & Hess, and as and for its answer to the Complaint for Declaratory Judgment ("Complaint") filed herein by AMERICAN MUTUAL REINSURANCE COMPANY ("AMRECO"), individually and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, states as follows:

1. Calvert admits that AMRECO is in the business of reinsuring property and casualty risks and organizing and managing a reinsurance pool consisting of property and casualty insurance companies but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 1 of the Complaint.

2. Calvert admits the allegations set forth in Paragraph 2 of the Complaint.

3. Calvert admits the allegations set forth in Paragraph 3 of the Complaint.

4. Calvert is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Complaint.

5. Calvert admits the allegations set forth in Paragraph 5 of the Complaint.

6. Calvert is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 6 of the Complaint.

7. Calvert admits the allegations set forth in Paragraph 7 of the Complaint.

8. Calvert admits the allegations set forth in Paragraph 8 of the Complaint.

9. Calvert admits that it executed the written agreement attached to AMRECO's Complaint as Exhibit "A" but, answering further, Calvert states that it was induced to

execute said written agreement by reason of material misrepresentations of fact and the failure to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading thus rendering the said agreement void *ab initio*.

10. Calvert admits that Paragraph Ten of the written agreement described in Paragraph 9 of the Complaint (hereinafter referred to as the "reinsurance participation agreement") contains the provisions set forth in Paragraph 10 of the Complaint but denies the remaining allegations set forth in Paragraph 10 of the Complaint.

11. Calvert admits the allegations set forth in Paragraph 11 of the Complaint.

12. Calvert admits that AMRECO has refused to terminate the reinsurance participation agreement as of January 1, 1974 but denies all of the remaining allegations set forth in Paragraph 12 of the Complaint.

13. Calvert admits the allegations set forth in Paragraph 13 of the Complaint.

14. Calvert admits that AMRECO contends that Calvert is bound by the reinsurance participation agreement through December 31, 1974 but denies all of the remaining allegations set forth in Paragraph 14 of the Complaint.

15. Calvert admits that a controversy exists between it and AMRECO but denies all of the remaining allegations set forth in Paragraph 15 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool which AMRECO offered and sold to Calvert on or about January 11, 1974 and which AMRECO offered and sold to more than 90 other insurance companies, constituted an

offer and sale to the public of a security within the meaning of Section 2(1) and 5 of the Securities Act of 1933, as amended (the "1933 Act").

2. Said security was not registered in violation of the registration requirements of Section 5 of the 1933 Act.

3. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

4. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security. Said notice is attached hereto as Exhibit "A" and made a part herof.

5. AMRECO has refused to accept the foregoing tender.

6. The failure of AMRECO to register said security entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

SECOND AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert by AMRECO constituted the offer and sale of a security within the meaning of Section 3(a)(10) of the Securities and Exchange Act of 1934, as amended (the "1934 Act").

2. In connection with the offer and sale of said security to Calvert, AMRECO, by the use of the mails and other means and instrumentalities of interstate commerce, has (1) employed devices, schemes and artifices to defraud; (2) made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the

circumstances under which they were made, not misleading; and (3) engaged in acts, practices and a course of business which have operated as a fraud and deceit upon Calvert in violation of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder.

3. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

4. AMRECO has refused to accept the foregoing tender.

5. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has suffered substantial injury and is entitled to rescission of its purchase of the aforesaid security.

THIRD AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-½,§137-2.1, and Rule 130 promulgated thereunder.

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law.

3-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 and 4 of its Second Affirmative Defense as Paragraphs 3 and 4 of its Third Affirmative Defense as though set forth fully herein.

5. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

6. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescission of its purchase of the aforesaid security.

FOURTH AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 Multiple Line Pool offered and sold to Calvert on January 11, 1974 by AMRECO constitutes the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act, as more fully described hereinafter.

3. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

FIFTH AFFIRMATIVE DEFENSE

1. In order to induce Calvert to enter into reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, made material misrepresentations of fact to Calvert concerning the 1974 AMRECO Multiple Line Pool.

2. In reliance on AMRECO's material misrepresentations of fact, Calvert executed the reinsurance participation agreement on or about January 11, 1974.

3. Had Calvert known that the foregoing representations were false, it would not have signed said reinsurance participation agreement.

4. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

SIXTH AFFIRMATIVE DEFENSE

1. By the pleadings filed in this cause, AMRECO purports to act as agent for the members of the unincorporated association known as the 1974 AMRECO Multiple Line Pool.

2. The only agreements executed by the members of the 1974 AMRECO Multiple Line Pool were identical to the agreement annexed to AMRECO's Complaint as Exhibit "A" and said agreement does not confer authority upon AMRECO to maintain any suit or proceeding on behalf of the members of the 1974 AMRECO Multiple Line Pool.

3. Since AMRECO is without authority to institute this action, its Complaint must be stricken and this action dismissed.

SEVENTH AFFIRMATIVE DEFENSE

AMRECO participated in and managed the 1974 AMRECO Multiple Line Pool without obtaining the approval of the Illinois Department of Insurance in violation of 73 Ill. Rev. Stat. §786.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter judgment in its favor against AMERICAN MUTUAL REINSURANCE COMPANY and that costs be taxed to AMERICAN MUTUAL REINSURANCE COMPANY.

COUNTERCLAIM

As and for its Counterclaim to the said Complaint for Declaratory Judgment, Calvert states as follows:

COUNT ONE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool which AMRECO offered and sold to Calvert on or about January 11, 1974 and which AMRECO offered and sold to more than 90 other insurance companies, constituted an offer and sale to the public of a security within the meaning of Sections 2(1) and 5 of the Securities Act of 1933, as amended (the "1933 Act").

2. Said security was not registered in violation of the registration requirements of Section 5 of the 1933 Act.

3. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

4. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

5. AMRECO has refused to accept the foregoing tender.

6. The failure of AMRECO to register said security entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT TWO

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-1/2, §137-2.1, and Rule 130 promulgated thereunder.

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law.

3. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

4. AMRECO has refused to accept the foregoing tender.

5. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

6. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescission of its purchase of the aforesaid security.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT THREE

1. The participatory interest in the 1974 Multiple Line Pool offered and sold to Calvert on January 11, 1974 by AMRECO constitutes the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act.

3. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT FOUR

1. In order to induce Calvert to enter into the reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, made material misrepresentations of fact to Calvert concerning the 1974 AMRECO Multiple Line Pool.

2. In reliance on AMRECO's material misrepresentations of fact, Calvert executed the reinsurance participation agreement on or about January 11, 1974.

3. Had Calvert known that the foregoing representations were false, it would not have signed said reinsurance participation agreement.

4. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

CALVERT FIRE INSURANCE COMPANY

By_____
Its Attorney

Michael L. Weissman
Aaron, Aaron, Schimberg & Hess
One First National Plaza
Chicago, Illinois 60603
(312) 236-8552

EXHIBIT "A"

CALVERT FIRE INSURANCE COMPANY
300 St. Paul Place
Baltimore, Maryland 21202

January 9, 1975

American Mutual Reinsurance Company,
individually and as agent for the
property and casualty insurance
companies which are participants
in the 1974 AMRECO Multiple Line
Pool,
One East Wacker Drive
Chicago, Illinois 60601

Attention: Mr. Wallace E. Winter, President

NOTICE OF RESCISSION

Gentlemen:

Pursuant to the applicable provisions of the Securities Act of 1933, as amended, the Securities Exchange Act of 1934, as amended, and the Illinois Securities Act of 1953, the undersigned corporation hereby elects to rescind the purchase of the security which it made from you on January 11, 1974 effective as of January 1, 1974 as per our telegram to you dated April 19, 1974 and our letter to you dated April 22, 1974. We tender to you herewith any interest which we acquired in the security, i.e., our participation in the 1974 AMRECO Multiple Line Pool.

The exercise of the right of rescission is without prejudice to any claim for damages we have under common law or federal or state securities laws.

Yours very truly,

CALVERT FIRE INSURANCE COMPANY

By: _____

Its Attorney

RECEIPT ACKNOWLEDGED:
this 9th day of January, 1975.

AMERICAN MUTUAL
REINSURANCE COMPANY

By: _____

Appendix 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CALVERT FIRE INSURANCE COMPANY,
a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE
COMPANY, an Illinois corporation,
Defendants.

COMPLAINT

Now comes the plaintiff, CALVERT FIRE INSURANCE COMPANY ("Calvert"), by its attorneys, Michael L. Weissman, Dean A. Dickie and Mary K. Krigbaum, and complaining of the defendant, AMERICAN MUTUAL REINSURANCE COMPANY ("AMRECO") states as follows:

COUNT I

JURISDICTION

1. The jurisdiction of the Court is based on Section 22(a) of the Securities Act of 1933, as amended ("1933 Act") and Section 27 of the Securities Exchange Act of 1934, as amended ("1934 Act").

2. The claims alleged herein arise under the 1933 Act and the 1934 Act, particularly Section 12(1) of the 1933 Act, Section 10(b) of the 1934 Act, and the rules and regulations promulgated thereunder, particularly Rule 10b-5 thereof.

3. Calvert is a corporation incorporated under the laws of the State of Pennsylvania and has its principal office in the State of Maryland. AMRECO is a corporation incorporated under the laws of the State of Illinois and has its principal office in the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00) and this Court has jurisdiction of this matter under 28 U.S.C. 1332 (a)(1).

4. At all times mentioned herein, Calvert was and is in the business of writing property and casualty insurance. At all times mentioned herein, AMRECO was and is in the business of managing reinsurance pools.

5. AMRECO solicits the participation of other property and casualty insurance companies who will agree to accept portions of the risks and premiums of the reinsurance pools organized and managed by AMRECO.

6. Various property and casualty insurance companies participated in AMRECO's 1974 Multiple Line Pool with the expectation of deriving a profit from the organizational and managerial efforts of AMRECO.

7. Calvert executed a written agreement to participate in the 1974 AMRECO Multiple Line Pool with AMRECO on or about January 11, 1974, a copy of which is attached hereto as Exhibit "A" (hereinafter sometimes referred to as the "reinsurance participation agreement"). Calvert was induced to execute said agreement by reason of material misrepresentations of fact and by the failure of AMRECO to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

8. AMRECO's offer and sale of participatory interests in the 1974 AMRECO Multiple Line Pool to Calvert and at least 99 other insurance companies located in diverse parts of the

United States constituted an offer and sale to the public of a security within the meaning of Sections 2(1) and 5 of the 1933 Act.

9. Said security was not registered prior to its being offered and sold in violation of the registration requirements of Section 5 of the 1933 Act.

10. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

11. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security. Said notice is attached hereto as Exhibit "B" and made a part hereof.

12. AMRECO has refused to accept the foregoing tender.

13. The failure of AMRECO to register said security prior its being offered and sold entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other relief as it shall deem equitable and appropriate.

COUNT II

1-7. Calvert hereby realleges and incorporates by reference Paragraphs 1 through 7 of Count I of this Complaint as Paragraphs 1 through 7 of Count II of this Complaint as though set forth fully herein.

8. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert by AMRECO constituted the offer and sale of a security within the meaning of Section 3(a)(10) of the Securities and Exchange Act of 1934, as amended (the "1934 Act").

9. In connection with the offer and sale of said security to Calvert, AMRECO, by the use of the mails and other means and instrumentalities of interstate commerce, has (1) employed devices, schemes and artifices to defraud; (2) made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (3) engaged in acts, practices and a course of business which have operated as a fraud and deceit upon Calvert in violation of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, as more fully described hereinafter.

10. Negotiations between AMRECO and Calvert for the purchase and sale of said security began in the spring of 1973 and continued until the time the reinsurance participation agreement was signed on or about January 11, 1974.

11. In order to induce Calvert to purchase said security AMRECO, through its agents, including a certain Robert Morris, represented to Calvert, among other things, that its financial statements and experience figures for the years 1947 through 1972 were representative of their current financial status and experience figures and that said statements and figures could be used to evaluate the merits of a participatory interest in the 1974 AMRECO Multiple Line Pool.

12. In fact, AMRECO and its agents knew, or with the exercise of reasonable care and diligence should have known, that its past performance through 1972 could not be used as an accurate basis for evaluating the aforesaid security in view of a change in accounting policy and procedures made during 1973.

13. During the fourth quarter of 1973, reserve adjustments in the amount of approximately $11,000,000 were made by

AMRECO. As a result of said adjustments, AMRECO's performance prior to 1973 could not in fact be used as a true basis for evaluating the aforesaid security which AMRECO offered to Calvert.

14. As a result of said adjustments and other factors, unknown to Calvert, AMRECO's combined operating ratio increased from 92.3% in 1972 to 131% in 1973.

15. Although Calvert made repeated requests for the 1973 experience figures, financial statements and combined operating ratios prior to purchasing the security, AMRECO refused to divulge such information and failed to give any indication of the change in its accounting policy and procedures.

16. Calvert purchased the aforesaid security on or about January 11, 1974 in reliance on AMRECO's experience figures, financial statements and combined operating ratio for years prior to 1973, and without knowledge of the substantial reserve adjustment made by AMRECO in 1973.

17. The foregoing misrepresentations and omissions to state material facts were not discovered by Calvert until on or about April 15, 1974 when Calvert first received AMRECO's annual report for 1973. Calvert promptly terminated the reinsurance participation agreement effective as of January 1, 1974.

18. In addition, on January 9, 1975, Calvert delivered a notice of rescission of its purchase of the aforesaid security to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any interest in the aforesaid security.

19. AMRECO has refused to accept the foregoing tender.

20. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has suffered substantial injury and is entitled to rescind its purchase of the aforesaid security.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY respectfully prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void or, in the alternative, if this Court should find that Calvert is not entitled to rescission, Calvert prays that this Court award damages against the defendant AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT III

1-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 6 of Count I of this Complaint as Paragraphs 1 through 4 of Count III of this Complaint as though set forth fully herein.

5. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold by AMRECO to Calvert on or about January 11, 1974 constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-1/2, §137-2.1, and Rule 130 promulgated thereunder.

6. In connection with the offer and sale of said security to Calvert, AMRECO made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law, as more fully described hereinafter.

7-16. Calvert hereby realleges and incorporates by reference Paragraphs 10 through 19 of Count II of this Complaint as Paragraphs 7 through 16 of Count III of this Complaint as though set forth fully herein.

17. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

18. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescind its purchase of the aforesaid security.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of its participatory interest in the 1974 AMRECO Multiple Line Pool was and is null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT IV

1-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 6 of Count I of this Complaint as Paragraphs 1 through 4 of Count IV of this Complaint as though set forth fully herein.

5. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

6. In connection with the offer and sale of said security to Calvert, AMRECO made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act, as more fully described hereinafter.

7-13. Calvert hereby realleges and incorporates by reference Paragraphs 10 through 16 of Count I of this Complaint as Paragraphs 7 through 13 of Count IV of this Complaint as though set forth fully herein.

14. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT V

1-5. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 7 of Count I of this Complaint as Paragraphs 1 through 5 of Count V of this Complaint as though set forth fully herein.

6. Negotiations between AMRECO and Calvert for the latter's participation in the 1974 AMRECO Multiple Line Pool began in the spring of 1973 and continued until the time the participation agreement was signed by the parties on or about January 11, 1974.

7. In order to induce Calvert to enter into said reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, represented to Calvert, among other things, that its financial statements and experience figures for the years 1947 through 1972 were representative of their current financial status and experience figures and that said statements and figures could be used to evaluate the merits of a participatory interest in the 1974 AMRECO Multiple Line Pool.

8. AMRECO and its agent knew or believed that AMRECO's performance through 1972 could not be used as an accurate basis for evaluating the aforesaid reinsurance participation interest in view of a change of accounting policy and procedures made during 1973.

9. During the fourth quarter of 1973, reserve adjustments in the amount of approximately $11,000,000 were made by AMRECO. As a result of said adjustments, AMRECO's performance prior to 1973 could not in fact be used as a true basis for evaluating a participatory interest in the 1974 AMRECO Multiple Line Pool.

10. As a result of said adjustments and other facts unknown to Calvert, AMRECO's combined operating ratio increased from 92.3% in 1972 to 131% in 1973.

11. Calvert executed the reinsurance participation agreement on or about January 11, 1974 in reliance on AMRECO's representations that its experience figures, financial statements and combined operating ratio for years prior to 1973 were representative of such figures for 1973 and 1974 and without knowledge of the falsity of such material representations of fact.

12. Had Calvert known that the foregoing representations were false, it would not have signed the said reinsurance participation agreement.

13. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY respectfully prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

CALVERT FIRE INSURANCE COMPANY

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Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT AMERICAN MUTUAL REINSURANCE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

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AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT AMERICAN MUTUAL REINSURANCE COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Petitioner's Statement of the Case, which American Mutual Reinsurance Company ("Amreco") adopts, is based upon the opinion of the Court of Appeals.

Because of the nature of the proceeding in the Court of Appeals, the record before that court consisted only of the motion to file a Petition for Writ of Mandamus directed to Judge Will and the Briefs in Support of and in Opposition to the motion.

However, for this Court to fully appreciate the ramifications of the Court of Appeals decision the history of the parallel state court action must be considered.

This litigation was commenced in July of 1974 when Amreco filed a straightforward contract action against Calvert Fire Insurance Company ("Calvert") in the Circuit Court of Cook County, Illinois. Amreco in its Complaint alleged that Calvert breached its reinsurance contract with Amreco. Amreco had a similar contract with 99 other reinsurers. The reinsurance contract, in question, covered the year 1974, a year in which casualty and fire losses were unusually high.

Calvert was the only one of the 100 reinsurers who were parties to similar contracts that attempted to avoid its liability under the reinsurance contract. Calvert has alleged that Amreco made misrepresentations in order to induce Calvert to enter the contract.

Amreco is prepared to prove that Calvert attempted to rescind its agreement only after Calvert became aware of potential losses under the reinsurance agreement resulting from a disastrous wave of tornados which struck the South and Midwest in early April, 1974.[1]

The basic dispute is simple. The only issue is whether Calvert was induced by fraud to enter the agreement or whether Calvert is attempting to avoid liability under the agreement because the reinsurance industry incurred heavy losses in early 1974. This is the real issue, but Calvert has not sought to have that issue resolved by any court. Rather, Calvert has mounted a two pronged diversionary attack. First, Calvert attempted to disguise the real issue by raising a "security" issue smoke screen. Second, Calvert has ingeniously pursued virtually every avenue of motion practice and appeal to avert a determination of the real issue for 3½ years.

---

1. "Twisters Put Reinsurers in the Forefront", The National Underwriter, April 12, 1974, at 1, col. 4 ("The reinsurers are going to get murdered"). The telegram from G. E. Roberts, President of Calvert, demanding Amreco to "Terminate our multi-line reinsurance agreement retroactive to January 1, 1974" was sent on April 19, 1974.

Amreco has sought a prompt adjudication of the issue but has been subjected to a continuing barrage of dilatory and burdensome procedures. To avoid an adjudication of the basic issues, Calvert has:

1. Moved to have Amreco's action dismissed on the ground that declaratory action was not an appropriate remedy for breach of contract.
2. Moved to stay discovery in the state court action pending its motion to dismiss.
3. Attempted, a second time, to have Amreco's action dismissed or, in the alternative, transferred from the Law Division to the Equity Division to determine whether the matter should be heard as a class action.
4. Answered Amreco's Complaint alleging as both affirmative defenses and counterclaims violations of federal and state securities laws. Calvert also alleged common law fraud as a defense to Amreco's action and as a counterclaim. Calvert also pleaded a violation of Rule 10b-5 as a defense to Amreco's complaint.
5. Instituted the instant action in the United States District Court. The only addition to the allegations made by Calvert in the Illinois court, was the addition of Rule 10b-5 as authority for its ancillary claim for money damages in the amount of $2 million.
6. Moved to stay the state court proceedings pending the outcome of its federal court action. This motion was summarily denied.
7. Having failed to have the state court actions stayed, sought a change of venue on the grounds that the trial court was prejudiced against Calvert. Calvert's motion, again, was summarily denied.
8. Filed a petition for writ of mandamus in the Supreme Court of Illinois, after the state trial court had issued its decision on Calvert's defenses and counterclaims, seeking an order that the trial court judge grant Calvert's motion for a change of venue. This motion was summarily denied by the Illinois Supreme Court.

9. Sought an interlocutory appeal to the Appellate Court of Illinois, when the trial court rejected Calvert's alleged defenses and counterclaims based on federal and state securities laws. The appeal was granted, and the Illinois Appellate Court affirmed the decision of the state trial court.

10. Sought leave to appeal to the Illinois Supreme Court from the judgment of the Illinois Appellate Court. Amreco has filed a Brief in Opposition to Calvert's petition. If Calvert's petition for Leave to Appeal is denied, the judgment of the Appellate Court of Illinois and the Circuit Court of Cook County will become final under Illinois law.

Calvert's ingenuity at motion practice and appeal is demonstrated by the fact that at this date it has succeeded in bringing one aspect or another of this matter before the Circuit Court of Cook County, Illinois, the Appellate Court for the First District of Illinois, the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, and the United States Court of Appeal for the Seventh Circuit. Amreco has been required to respond to each of Calvert's efforts. Presentation of Judge Will's petition to this Court, involves the sixth court to consider some aspect of this matter.

Calvert has been so successful in avoiding the simple issue involved in this case, that its defense, if any, has been obscured. Calvert has attempted to cast this simple transaction into a "security" issue solely to divert attention from the real merits of the matter.

Judge Will, perceived this very early and proceeded to issue his stay order to confine Calvert's legal gymnastics to the state courts. Unfortunately, the Seventh Circuit Court of Appeals in issuing its writ of mandamus to Judge Will, has permitted Calvert to continue its dilatory practices in the federal courts.

If Calvert's past actions can be used as any measure of its future activities, it is clear Calvert will attempt to pursue its state court matter to this Court by writ of certiorari. At the same time with the federal court doors now opened to Calvert, Calvert will have the opportunity to have Judge Will determine that its reinsurance contract is not a "security". The next step will be for Calvert to seek review of Judge Will's decision in the Seventh Circuit Court of Appeals and, if not satisfied there, seek certiorari in this Court.

ARGUMENT.

I.

GRANTING THE WRIT OF CERTIORARI AND SUMMARY REVERSAL OF THE DECISION BELOW WILL PREVENT ABUSIVE PROCEDURAL TACTICS FROM BECOMING LITIGATING STRATEGIES IN THE SEVENTH CIRCUIT. IT WILL RESTORE TO DISTRICT JUDGES, IN APPROPRIATE CASES, THE DISCRETION TO PROTECT LITIGANTS FROM BURDENSOME DUPLICATIVE LITIGATION.

As demonstrated above, Calvert has had its "security" issue determined by the Illinois trial court, the Illinois Appellate Court and is now seeking review of the issue in the Illinois Supreme Court.

Notwithstanding the impending final resolution of the issue in the state court, the Court of Appeals for the Seventh Circuit has granted Calvert the right to an "immediate" adjudication of the same issue by Judge Will in the United States District Court. Calvert will pursue that right despite the indication made by Judge Will that he would rule that the reinsurance contract in question was not a security.[2]

Absent all questions of *res judicata* and collateral estoppel resulting from the state court determination, there is no valid

2. Transcript of Proceedings before the Hon. Hubert L. Will on June 18, 1975, at 3, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

reason why Calvert, which has placed the federal securities issue before both the state courts and the United States District Court, should be the beneficiary of a writ of mandamus directing Judge Will to immediately adjudicate its "security" issue. The result of such a ruling can only be another appeal by Calvert to the United States Court of Appeals, after Judge Will rules. The only purpose of such an appeal would be the hope of Calvert that the Court of Appeals for the Seventh Circuit would rule contrary to the Circuit Court of Cook County, the Illinois Appellate Court and Judge Will, enabling Calvert to present inconsistent adjudications of the same case to this Court for resolution.

The failure of this Court to grant the writ of certiorari and reverse the Court of Appeals decision will permit Calvert to continue shopping for a court which will favorably rule on its "security" issue, notwithstanding the fact several courts have already considered the question. Unquestionably, the Court of Appeals decision effectively condones Calvert's decision shopping, and undoubtedly will encourage other litigants to follow Calvert's example. Summary reversal of the Court of Appeals decision, as suggested by the Petitioner, will prevent this abusive practice from becoming an established litigating procedure in the Seventh Circuit.

The Court of Appeals decision is all the more grievous because it is predicated upon the assumption that Calvert had a claim under the Securities Exchange Act of 1934 against Amreco. Nothing could be further from reality.

Calvert's claim for money damages is merely the reverse side of Calvert's claim for rescission of the contract. Calvert has paid nothing to Amreco under its contract. Money damages would accrue to Calvert only if it were held liable under the contract. If granted rescission, no damages would ensue. Calvert's claim for rescission under the federal securities acts has been raised by Calvert in the Illinois case. The money damage claim is totally superfluous to Calvert's claims and defenses as was recognized by

Judge Will during oral argument[3] and apparently was included by Calvert in part to maximize the possibility of securing dual adjudications in the state and federal courts.

That this Court intended its decision in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976) to bring the foregoing results is simply untenable. That the Court of Appeals for the Seventh Circuit did not appreciate the practical consequences and ramifications of its issuance of the Writ of Mandamus is patently clear.

The history of this litigation clearly exemplifies the unintended ramifications of the Seventh Circuit's application of this Court's decision in *Colorado River*. To avoid such abusive practices in the future, district court judges must be revested with the authority they formerly possessed to control their dockets. This Court may rectify this situation quickly, by summarily reversing the decision below with a brief reaffirmance of *Landis* v. *North American Co.*, 299 U. S. 248 (1936) as suggested by the Petitioner.

II.

THE GRANTING OF THE WRIT OF CERTIORARI WILL REMEDY THE PLAINLY ERRONEOUS INTERPRETATION OF THE COURT OF APPEALS OF THIS COURT'S HOLDING IN THE COLORADO RIVER CASE.

The Court of Appeals for the Seventh Circuit totally misapprehended the holding of this Court in the *Colorado River* case in determining to issue the writ of mandamus to the Honorable Hubert L. Will. *Colorado River*, indeed, may be read as supporting a dismissal of this case. In the *Colorado River* case, this Court approved the propriety of dismissing an action commenced in the United States District Court when the same issue was pending in the state court. The Court of Appeals for the Seventh

3. Transcript of Proceedings before the Hon. Hubert L. Will on May 9, 1975, at 50, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

Circuit read *Colorado River* as permitting a court to stay procedures only in "exceptional circumstances", not finding such circumstances in this case.

The *Colorado River* case does not support, much less demand, the decision below. In *Colorado River,* the cause of action was dismissed and the aggrieved party in *Colorado River* was deprived of any remedy in federal court. This Court was understandably cautious in sanctioning a final dismissal.

The instant case does not involve a dismissal but merely a stay order. Calvert has not been deprived of any federal remedy. The adjudication of Calvert's federal remedy has merely been postponed by Judge Will's order granting the stay of proceedings and his unwillingness to proceed with the ancillary Rule 10b-5 claim while the substantive issues of the federal securities laws were litigated by Calvert in the courts of Illinois.

Colorado River does not support the Court of Appeals issuance of a writ of mandamus. *Colorado River* teaches, to the contrary, that federal judges have discretion, which was utilized by Judge Will, when necessary to avoid piecemeal litigation. Even when speaking of dismissal of the action rather than mere postponement, *Colorado River* teaches:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert* 330 U.S. 501, 91 L.Ed. 1055, 67 S.Ct. 839 (1947), the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495, 86 L.Ed. 1620, 62 S.Ct. 1173 (1942), and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447, 60 L.Ed. 1084, 36 S.Ct. 637 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." 424 U. S. at 818-19.

These are exactly the elements Judge Will considered in deciding to postpone ruling on certain aspects of the federal claim.

Arguably, if he had the discretion under *Colorado River* to dismiss on those grounds, certainly he may exercise the lesser power to postpone. Any other reading of *Colorado River* completely undermines the intent of this Court.

Any contrary reading of *Colorado River* would lead to the conclusion that a District Court must grant an "immediate" adjudication to a person claiming a federal right even while that same party has had two adjudications of the issue in the state courts and is still vigorously pursuing its remedies based upon the federal statutes in the state courts.

The granting of the writ of certiorari in the instant case and summary reversal of the decision below would cure the confusion resulting from the opinion of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is therefore respectfully submitted that the writ of certiorari should be granted and the writ of mandamus vacated.

Amreco concurs, with the Petitioner, that summary reversal is the most expedient disposition of this matter, and, therefore, respectfully suggests summary reversal of the decision below.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL,
Judge, United States District Court for
the Northern District of Illinois,

Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1977
CERTIORARI GRANTED JANUARY 9, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL,
Judge, United States District Court
for the Northern District of Illinois,

Petitioner,

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CALVERT FIRE INSURANCE COMPANY,

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and

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF SELECTED DOCKET ENTRIES

May 26, 1976—Notice of filing Petition for Writ of Mandamus.

May 26, 1976—Petition for Writ of Mandamus.

September 16, 1976—Oral argument; heard and taken under advisement.

November 5, 1976—Additional authority submitted by Calvert.

August 15, 1977—Opinion of United States Court of Appeals for the Seventh Circuit.

September 6, 1977—American Mutual's motion for stay of writ of mandamus and for stay of operation of writ of mandamus pending petition for certiorari.

September 16, 1977—Order that operation of writ of mandamus is stayed until October 17, 1977.

October 7, 1977—Order that Calvert's motion to vacate order of September 16, 1977 staying operation of writ of mandamus is denied; stay will continue in effect until October 17, 1977.

October 14, 1977—Motion of Honorable Hubert L. Will to extend order staying operation of writ of mandamus until November 14, 1977.

October 17, 1977—Order that motion of Judge Will to further stay operation of writ of mandamus is granted, and proceeding is stayed until November 14, 1977.

November 17, 1977—Notice from Supreme Court dated November 14, 1977 that this case has been docketed as No. 77-693.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No.

CALVERT FIRE INSURANCE COMPANY,
Plaintiff-Petitioner,

v.

HONORABLE HUBERT L. WILL,
Judge of the United States District Court for the Northern District of Illinois,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Defendant-Respondent.

Notice of Filing of Petition for Writ of Mandamus

HONORABLE HUBERT L. WILL,
Judge Presiding

NOTICE OF FILING OF PETITION FOR WRIT OF MANDAMUS OF CALVERT FIRE INSURANCE COMPANY

To: Honorable Hubert L. Will,
Judge of the United States District Court,
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Messrs. Thomas J. Weithers and John L. Kirkland
69 West Washington Street
Chicago, Illinois, 60602
Attorneys for AMERICAN MUTUAL REINSURANCE COMPANY

PLEASE TAKE NOTICE that on Wednesday, May 26, 1976, the undersigned has caused to be filed with the Clerk of the United States Court of Appeals for the Seventh Circuit the Petition for Writ of Mandamus of CALVERT FIRE INSURANCE COMPANY, a copy of which is attached hereto and served upon you.

MICHAEL L. WEISSMAN
Attorney for
CALVERT FIRE INSURANCE COMPANY

Aaron, Aaron, Schimberg & Hess
33rd Floor East
One First National Plaza
Chicago, Illinois, 60603
236-8552

(Certificate of Service Omitted in Printing.)

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

PETITION FOR WRIT OF MANDAMUS OF CALVERT FIRE INSURANCE COMPANY

Now comes CALVERT FIRE INSURANCE COMPANY ("Calvert") and petitions this Court that the HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois, be required by Writ of Mandamus to vacate his Opinion and Order of May 6, 1975 and proceed to adjudicate your Petitioner's cause of action under Section 10(b) of the Securities and Exchange Act of 1934.

In support of this Petition, your Petitioner respectfully represents unto this Court as follows.

The Issue Raised by This Petition

The question which this Petition raises for review is whether or not a District Court should adjudicate a cause of action under Section 10(b) of the Securities and Exchange Act of 1934 (the "1934 Act") seeking both money damages and equitable relief when the same parties are involved in a declaratory judgment proceeding in a state court in which Section 10(b) is raised as an affirmative defense.

The District Court's ruling that it should not make the adjudication followed from this Court's decision in *Aetna State*

Bank v. *Altheimer*, 430 F. 2d 750 (7th Cir. 1970). Because the District Court followed *Aetna*, the decision below (Exhibit "A" hereto) is correct based upon the law in the Seventh Circuit at this time. But *Aetna* is not consistent with the Congressional policy embodied in Section 27 of the 1934 Act giving "exclusive jurisdiction" of "all suits in equity and actions at law brought to enforce any liability or duty created by" the 1934 Act. 15 U.S.C. §78aa.

Even the District Judge believes that the decision in *Aetna* has had unfortunate implications[1]. Furthermore, *Aetna* is in conflict with both the decision of the Second Circuit in *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F. 2d 662 (2nd Cir. 1971), *aff'g*, 321 F. Supp. 806 (S.D.N.Y. 1970) and the very recent opinion of the Third Circuit in *Cotler* v. *Inter-County Orthopaedic Association*, 526 F. 2d 537 (3rd Cir. 1975).

Because this Court's decision in *Aetna* is in conflict with the policy of Congress that *exclusive* jurisdiction of a cause of action under Section 10(b) of the '934 Act be vested in the federal courts and is contrary to the Second Circuit's opinion in *Movielab* and the Third Circuit's opinion in *Cotler*, it is important that this issue again be considered by this Court[2]. Although mandamus may seem to be a cumbersome way to raise the issue, it is the only way in which the question could be raised in this Court in light of the record below.

Status of The Proceeding

1. Calvert filed this action on January 10, 1975 seeking relief under the Securities Act of 1933, the Securities Exchange

[1] Tr. 4/9/75, p. 23. See also, *McGough* v. *First Arlington National Bank*, 519 F. 2d 552 (7th Cir. 1975) wherein Judge McGarr was told he had "misapplied the rationale of Aetna . . .".

[2] The instant petition does not challenge Judge Will's ruling abating those of Calvert's claims for relief with respect to which there is *concurrent* federal and state court jurisdiction; it is directed solely to Calvert's Section 10(b) claim.

Act of 1934, the Illinois and Maryland Blue Sky laws and for common law fraud. It stemmed from Calvert's assertion that defendant, AMERICAN MUTUAL REINSURANCE COMPANY ("Amreco"), had fraudulently induced it into acquiring a participatory interest in Amreco's 1974 Multiple Line Pool. The federal securities law counts of Calvert's complaint were based on Calvert's assertion that the participatory interest which Amreco sold to Calvert (and 99 other Pool participants) was a "security".

2. Amreco responded with a motion to abate or, in the alternative, to dismiss. The motion to abate stemmed from the fact that Amreco had previously filed a declaratory judgment proceeding in the Circuit Court of Cook County, Illinois. The alternative motion to dismiss was premised on the argument that the participatory interest in the 1974 Multiple Line Pool which Amreco issued and sold to Calvert (and the other 99 Pool participants) was not a "security" under either federal or state securities laws and, that even if it were a "security", the McCarran-Ferguson Act precluded the application of the federal securities laws to the transaction.

3. On April 9, 1975 Judge Will indicated he would grant Amreco's motion to abate based upon this Court's holding in *Aetna*. On that same date Calvert asked Judge Will to certify his ruling as an appealable interlocutory decision under 28 U.S.C. 1292(b). In response to this request, Judge Will said he was not deciding the issue at this time,

> " . . . but my predilection, obviously, is to let you raise it with the Seventh Circuit and see if you can get them either to reverse themselves, or narrow the scope of their earlier decision, which it seems to me, has some unfortunate implications." (Tr. 4/9/75, pp. 22-23).

4. On April 21, 1975 Calvert formally requested that Judge Will certify his ruling of April 9, 1975 as an appealable

interlocutory decision under 28 U.S.C. 1292(b). In its motion, Calvert directed Judge Will's attention to the conflict between *Aetna* and the Second Circuit's decision in *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F. 2d 662 (2nd Cir. 1971), *aff'g*, 321 F. Supp. 806 (S.D.N.Y. 1970). Judge Will indicated that the request for interlocutory certification should be deferred until a written opinion, then in preparation, was delivered.

5. On May 6, 1975 Judge Will issued his Memorandum Opinion and Order holding that all aspects of this cause should be stayed, excepting only Calvert's claim for money damages under the 1934 Act.

6. The parties then submitted briefs on the "threshold" issue in the case, i.e., is a participatory interest in Amreco's reinsurance pool a "security". Judge Will heard oral argument on this question on May 9, 1975. On that same day, May 9, 1975, all discovery in this proceeding was stayed.

7. On June 19, 1975 Amreco sought to leave to file, as part of the record in this cause, orders which had been entered by Judge Arthur L. Dunne on June 16, 1975 and June 17, 1975 in the state court action holding that participatory interests in the reinsurance pool were not securities and that the application of the federal securities law was barred by the McCarran-Ferguson Act.

8. On June 24, 1975 Amreco moved to dismiss the entire proceeding. On August 21, 1975 Calvert moved for reconsideration of Judge Will's Opinion and Order of May 6, 1975. On September 10, 1975 Judge Will entered an order denying both Amreco's motion to dismiss and Calvert's motion for reconsideration.

9. The case remained inactive until March 1, 1976 when Calvert again moved for reconsideration of the Opinion and Order of May 6, 1975 in light of the decision of the Third Circuit rendered December 1, 1975 in *Cotler* v. *Inter-County Orthopaedic Association*, 526 F. 2d 537 (3rd Cir. 1975).

10. On April 5, 1976 Judge Will entered an order denying Calvert's motion for reconsideration of his Memorandum Opinion and Order of May 6, 1975. This left Calvert no remedy in the federal courts except by Petition for a Writ of Mandamus in conformity with the route taken by the petitioner in *Cotler, supra.*

Why The Writ Should Be Granted

The Writ of Mandamus should be granted directing Judge Will to proceed with Calvert's Section 10(b) action because Calvert has been deprived of the right to proceed in a federal court in an instance in which Congress has unequivocally said it is entitled to do so. To the extent that *Aetna* mandates to the contrary, it is not a good law. It has been so characterized by Judge Will. Thus, at the hearing on April 9, 1975 at which he indicated he was bound by *Aetna* as the controlling law in this Circuit, Judge Will pointedly observed:

> "I would be happy to be reversed on it." (Tr. 4/9/75, p. 22).

Calvert respectfully submits that this Court's ruling in *Aetna* should be reconsidered in light of the opinion in *Cotler* v. *Inter-County Orthopaedic Association, P.A.*, 526 F. 2d 357 (3rd Cir. 1975).

In the *Cotler* case, the Third Circuit issued a writ of mandamus to a District Court directing him to proceed with an action under Section 10(b) of the 1934 Act even though the federal action had been preceded by a New Jersey state court declaratory judgment proceeding.

In its opinion, the Third Circuit said at 526 F. 2d 540: "Here, no matter how long the state court proceedings take, in the end the same district court must take up the § 10(b) claim, which cannot be disposed of by the state court". The court also

said: "The § 10(b) claim may be old and feeble at the end of the state court litigation, but it will not be dead".

However, the most compelling language appears at 526 F. 2d 541-42 where the Court of Appeals, holding that a writ of mandamus should issue, said:

> "*McClellan* v. *Carland,* 217 U.S. 268, 281-82, 30 S. Ct. 501, 54 L. Ed. 762 (1910) holds that a federal court having jurisdiction over a cause of action concurrent with a state court by virtue of diversity of citizenship may not stay its action so as to permit a state court action to be completed first, and that the court of appeals should by a writ of mandamus vacate the stay. *See also County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959); *Meredith* v. *Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943). *Cf. Thermtron Products, Inc.* v. *Hermansdorfer,* ____ ____ U.S. _____, 96 S. Ct. _____, 46 L. Ed. 2d _____. These cases, dealing with the concurrent jurisdiction of the federal courts, are *a fortiori* authority for the impropriety of staying a federal case involving a cause of action over which federal jurisdiction is exclusive. No court except a federal court can adjudicate the question whether stock in a professional corporation is a security within the meaning of the federal securities law. Although a state court may be able to determine the historical facts in this ongoing dispute, no court except a federal court can apply the governing federal legal standards for compliance with the federal securities law to those facts. Thus this is not a case in which by deferring to a state court a federal court may avoid decision of a federal constitutional law issue, *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), or avoid unnecessary friction with the

> administration of state policy, *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). If the district court had decided, preliminarily, that stock in a professional corporation is not a security within the meaning of § 10(b)—an issue which was not briefed here and on which we express no view—it would have had discretion to decline jurisdiction over the pendent state claims. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). But no valid purpose can be served by an arrangement whereby a plaintiff alleging a cause of action exclusively federal, relegated to state court fact-finding must then return to the federal court to litigate both the federal legal issues and the application of federal law to the facts found in the state court. Litigation over the judgment preclusion effects of the state court decision in such a context probably will be as complex as if the federal court had gone ahead with the entire case. No federal interest, no state interest, and no interest of the parties (other than delay) is served by the stay of the federal case.
>
> A writ of mandamus will issue directing the district court to vacate the order dated February 24, 1975 staying this action and the order dated February 25, 1975 directing the Clerk to administratively terminate the action in his records."

In *Cotler,* the novel question of law which the District Judge was *directed* to decide was the threshold issue of whether stock in a professional corporation was a "security" under the federal securities law. In the instant case, the novel question of law which Judge Will should decide is the threshold issue of whether a participatory interest in a reinsurance pool to which 100 insurance companies contribute is a "security". In each instance, as the Third Circuit noted in *Cotler, supra,* "No court

except a federal court can apply the governing federal legal standards for compliance with the federal securities law . . ."

Cotler poignantly demonstrates that Judge Will should not have declined to rule out of deference to the state court proceedings. Calvert was *entitled* to a ruling. Whatever transpired in the state court proceedings should not have affected Calvert's Section 10(b) claim.

Although Judge Will initially held that Calvert's Section 10(b) claim remained "viable" notwithstanding the abatement order, its longevity has been very short. When advised that Judge Dunne of the Circuit Court of Cook County, Illinois had decided that a participatory interest in the reinsurance pool was not a security under either federal or state law, Judge Will, in effect, abated the Section 10(b) claim.

In so doing, Judge Will clearly misconceived the deference which was due Judge Dunne's ruling. The ruling by Judge Dunne was not *res judicata* for at least two different reasons. First, it is not a final judgment. *State Life Insurance Co.* v. *Board of Education,* 394 Ill. 301, 317, 68 N. E. 2d 525 (1946) ("A final decree is one which finally decides and finally disposes of the merits of the case even though incidental matters may be reserved for consideration."); *American National Insurance Co.* v. *Lee Lim Shee,* 104 F. 2d 688, 692 (9th Cir. 1939) ("No question becomes *res judicata* until it is settled by final and conclusive judgment."). Judge Dunne's ruling was not a final judgment because it does not purport to touch upon many of the issues in the case and is subject to appellate review[3]. Secondly the law is well-settled that the doctrine of *res judicata* does *not* apply to 1934 Act claims over which federal

[3] Judge Dunne did not indend his ruling to be final inasmuch as he has certified questions of law for interlocutory review pursuant to Rule 308 of the Rules of the Supreme Court of Illinois. The certification includes the statement that "the order involves a question of law as to which there is substantial ground for difference of opinion".

courts have *exclusive* jurisdiction. *Moran* v. *Paine, Webber, Jackson & Curtis,* 279 F. Supp. 573, 578 (W.D.Pa. 1966), *aff'd* 389 F. 2d 242 (3rd Cir. 1968); *Wellington Computer Graphics, Inc.* v. *Modell,* 315 F. Supp. 24, 26 (S.D.N.Y. 1970).

Since Judge Dunne's ruling has no *res judicata* effect, it presents no bar to further proceedings before Judge Will. It is, therefore, respectfully submitted that this Court should follow the approach of the Third Circuit in *Cotler* and direct Judge Will to rule upon whether the particular instrumentality involved in the instant case is a security[4].

The approach of the Third Circuit in *Cotler* is fully consistent with the congressional grant of exclusive jurisdiction to the federal courts in Section 10(b) cases. It avoids the anomalous result of *Aetna* wherein District Courts may be compelled to defer from making an adjudication of a cause of action over which Congress has said they have exclusive jurisdiction.

Unless the Writ of Mandamus is granted, Calvert will be forever foreclosed from obtaining any relief in the District Court. In this Circuit, as in the Third Circuit, a stay order is not appealable. *Zalataka* v. *Metropolitan Life Insurance Co.,* 108 F. 2d 405, 406 (7th Cir. 1939). Calvert thus stands in precisely the same position as did the petitioner in *Cotler.* Therefore, unless a Writ of Mandamus issues, Calvert will be totally precluded from asserting a cause of action over which the District Court has exclusive jurisdiction.

The issue presented to the District Court for decision, i.e., whether or not a participatory interest in a reinsurance pool is a security, is a question of first impression. There are no other

[4] Judge Will was clearly of the view that it is desirable that this determination be made within the federal court system, saying:

> "I really think it would be desirable to have federal courts decide what is a security under the federal securities law." (Tr. 4/9/75, p. 23).

reported cases dealing with this issue. The resolution of this issue is of vital importance inasmuch as it affects a multi-million dollar industry whose operations stretch throughout the United States.

WHEREFORE, Petitioner, CALVERT FIRE INSURANCE COMPANY, prays that a Writ of Mandamus issue to the HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois, requiring him to adjudicate Petitioner's cause of action under Section 10(b) of the Securities and Exchange Act of 1934.

CALVERT FIRE INSURANCE COMPANY

By: .....

MICHAEL L. WEISSMAN
Its Attorney

Aaron, Aaron, Schimberg & Hess
33rd Floor East
One First National Plaza
Chicago, Illinois, 60603
236-8552

STATE OF ILLINOIS
COUNTY OF COOK } ss.

MICHAEL L. WEISSMAN, being first duly sworn on oath, deposes and says that he is the attorney for Petitioner, CALVERT FIRE INSURANCE COMPANY; that he has knowledge of the facts set forth in the above and foregoing Petition and that the contents of said Petition are true and correct according to the best of his knowledge and belief.

.....

MICHAEL L. WEISSMAN

SUBSCRIBED AND SWORN to before me
this 26th day of May, 1976.

.....

Notary Public

AARON, AARON, SCHIMBERG & HESS

(Names of Individuals deleted
from letterhead in printing.)

November 5, 1976

Thomas F. Strubbe, Esq.
Clerk, United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

By Messenger

Re: Calvert Fire Insurance Company vs.
Hon. Hubert L. Will No. 76-1495

Dear Mr. Strubbe:

Pursuant to Circuit Rule 11, I forward herewith seven copies of a letter citing additional authorities which are pertinent to the above mentioned appeal and should be considered by the court. The letter in question was prepared by my co-counsel, Professor Louis Loss. I would sincerely appreciate your making copies of this letter available to the panel. As required by Circuit Rule 11, copies are being sent to opposing counsel and Judge Will.

Yours truly,

Michael L. Weissman

MLW:meg
Enclosures
cc: Hon. Hubert L. Will
Thomas J. Weithers, Esq.

LOUIS LOSS
ATTORNEY AT LAW

LANGDELL HALL
CAMBRIDGE 02138
MASSACHUSETTS

AREA CODE 617
495-4626

November 1, 1976

Thomas F. Strubbe, Esquire
Clerk, United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: *Calvert Fire Insurance Company* v. *Will*, No. 76-1495

Dear Mr. Strubbe:

I enclose three additional copies of this letter, which I would appreciate your distributing to the judges in the above case. A copy is, of course, going to opposing counsel.

The purpose of the letter is to bring to the Court's attention a decision of the Supreme Court of the United States on March 24, 1976, which we have just discovered, and which is highly relevant (if not controlling) because of its discussion of the abstention doctrine and related principles. *Colorado River Water Conservation District* v. *United States*, 96 S. Ct. 1236.

The United States, seeking adjudication of reserved rights claimed on behalf of itself and certain Indian tribes (as well as rights based on state law) in waters in certain Colorado rivers, brought an action against some one thousand water users in the United States District Court. Shortly thereafter one of the defendants in that action sought in a Colorado state court to make the Government a party to proceedings there for the

purpose of adjudicating all the Government's claims, both state and federal, pursuant to 43 U.S.C. § 666, which gives consent to join the United States as a defendant in certain suits for the adjudication of water rights. The District Court dismissed the Government's suit on abstention grounds and the Court of Appeals reversed, holding that abstention was inappropriate.

In the Supreme Court the majority of six Justices held (1) that dismissal could not be supported under the abstention doctrine; (2) that there are additional principles that govern in situations involving the contemporaneous exercise of concurrent jurisdiction, whether by federal courts or by state and federal courts; (3) that the circumstances permitting the dismissal of a federal suit because of the presence of a concurrent state action "for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention"; but that (4) under the peculiar circumstances, primarily the enactment of 43 U.S.C. § 666, dismissal of the federal action was justified. The three dissenting Justices agreed with everything in the majority opinion except the conclusion that dismissal was justified under the circumstances.

The relevant language of the majority opinion (with citations and certain other matter deleted as indicated and with emphasis supplied) is as follows (96 S. Ct. at 1244-48):

> Next, we consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms.
>
> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide

> cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." • • • "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." • • • Our decisions have confined the circumstances appropriate for abstention to three general categories.
>
> (a) Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." • • •
>
> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. • • •
>
> • • •
>
> (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, • • • state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films • • • or collection of state taxes • • •.
>
> Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal

courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." * * * Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." * * * As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. * * * This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from *the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.* * * * Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. * * * In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, * * * the desirability of avoiding piecemeal litigation, * * * and the order in which jurisdiction was obtained by the concurrent forums * * *. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise

jurisdiction and the combination of factors counselling against that exercise is required. * * * *Only the clearest of justifications will warrant dismissal.*

Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran amendment itself [43 U. S. C. §666]. The clear federal policy envinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. * * *

* * *

> * * * We emphasize, however, that we do not overlook *the heavy obligation to exercise jurisdiction.* * * * But the opposing factors here, particularly the policy underlying the McCarran amendment, justify the District Court's dismissal in this particular case.

It is our submission that, absent the special circumstances that persuaded the majority in the *Colorado River* case, that case establishes that neither the abstention doctrine nor (*a fortiori*) concepts of sound judicial administration justified Judge Will's stay.

Very truly yours

Louis Loss

LL/js
Enclosures

**OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,
FILED AUGUST 15, 1977, WAS
PRINTED AS APPENDIX 1 TO
THE PETITION FOR CERTIORARI.**

No. 76-1495

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

MOTION FOR STAY OF WRIT OF MANDAMUS AND FOR STAY OF THE OPERATION OF THE WRIT OF MANDAMUS PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

American Mutual Reinsurance Company, defendant-respondent, moves that the Court stay the Writ of Mandamus and the operation of the Writ in the above cause pending application to the Supreme Court of the United States for Writ of Certiorari and in support of said motion says:

1. On September 6, 1977, the attorneys for American Mutual Reinsurance Company were advised that the Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois has requested the United States Attorney for the Illinois Eastern Division to prepare and file with the Clerk of the Supreme Court of the United States a Petition for Writ of Certiorari from the order of this Court entered on August 15, 1977 ordering the issuance of the Writ of Mandamus.

2. The attorneys for American Mutual Reinsurance Company have been informed that the United States Attorney for the Illinois Eastern Division of the Northern District will prepare and file on behalf of the Honorable Hubert L. Will a Petition for Writ of Certiorari to the

Supreme Court of the United States within the time required for the filing of said Petition.

3. That American Mutual Reinsurance Company will prepare and file a Petition for Writ of Certiorari to the Supreme Court of the United States, or, in the alternative, join in the Petition of the Honorable Hubert L. Will for Petition of Writ of Certiorari to the Supreme Court of the United States from the aforesaid order of this Court.

WHEREFORE, American Mutual Reinsurance Company moves that the Court enter an order staying the Writ of Mandamus in the above cause and staying operation of the Writ of Mandamus in the above cause pending the disposition of the aforesaid Petition or Petitions for Writ of Certiorari to the Supreme Court of the United States.

THOMAS J. WEITHERS, Attorney for
Defendant-Respondent

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
Suite 2700
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4400

STATE OF ILLINOIS
COUNTY OF COOK } ss

I, THOMAS J. WEITHERS, being sworn state that I am an attorney at law, a member of the firm of HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, attorneys for the defendant, AMERICAN MUTUAL REINSURANCE COMPANY, in the above-captioned cause and further state that I have read the above Motion for Stay and that the facts set forth in the motion are true and correct.

THOMAS J. WEITHERS

Thomas J. Weithers

SUBSCRIBED AND SWORN TO
before me this 6th day
of September, 1977.

MICHELLE B. MOLSRO

Notary Public

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 16, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

(Title Omitted in Printing.)

On August 15, 1977 this court filed its opinion in this matter granting the petition for writ of mandamus of the Calvert Fire Insurance Company. On September 6, 1977 counsel for the American Mutual Reinsurance Company filed herein its "MOTION FOR STAY OF WRIT OF MANDAMUS AND FOR STAY OF THE OPERATION OF THE WRIT OF MANDAMUS PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI." On September 12, 1977 counsel for the petitioner filed herein the "ANSWER OF CALVERT FIRE INSURANCE COMPANY TO THE MOTION OF AMERICAN MUTUAL REINSURANCE COMPANY FOR A STAY OF THE WRIT OF MANDAMUS AND FOR A STAY OF THE OPERATION OF THE WRIT OF MANDAMUS." This court has thoroughly reviewed the aforesaid documents and is fully advised concerning the circumstances of this matter. Accordingly,

IT IS ORDERED that the operation of the writ of mandamus in this matter is hereby STAYED to and including October 17, 1977, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 7, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

(Title Omitted in Printing.)

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "'MOTION OF CALVERT FIRE INSURANCE COMPANY, PLAINTIFF-PETITIONER, TO VACATE THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS" filed herein on September 29, 1977 by counsel for the petitioner.

2. The "RESPONSE OF AMERICAN MUTUAL REINSURANCE COMPANY TO CALVERT'S MOTION TO VACATE THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS" filed herein on October 5, 1977 by counsel for the respondent American Mutual Reinsurance Company.

This court has thoroughly reviewed the aforesaid documents and is fully advised concerning the circumstances of this matter. Accordingly,

IT IS ORDERED that the motion of the petitioner to vacate this court's order of September 16, 1977 staying the operation of the writ of mandamus is hereby DENIED. The stay granted in this court's order of September 16, 1977 will continue in effect until October 17, 1977, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

MOTION OF HONORABLE HUBERT L. WILL TO EXTEND THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS UNTIL NOVEMBER 14, 1977

The Honorable Hubert L. Will, Respondent, by his counsel, Milton V. Freeman, moves this Court to extend its order of September 16, 1977, staying the operation of the writ of mandamus issued August 15, 1977, until November 14, 1977, to enable him to file a petition for writ of certiorari in the United States Supreme Court in a timely and orderly manner.

Promptly after this Court's August 15, 1977 decision had been filed, Judge Will requested that a petition for writ of certiorari be prepared and filed in his behalf by by the office of the United States Attorney for the Northern District of Illinois. It remains the firm position of Judge Will that this proceeding raises critical issues concerning the extent of judicial discretion and the necessity that a trial judge be allowed to manage his own docket. Nevertheless, late in September, Judge Will's request was denied by the Department of Justice, and he was forced to seek new counsel. Judge Will has only recently retained Milton V. Freeman, Esquire, of the firm of Arnold & Porter, Washington, D. C., to prepare and file a petition for writ of certiorari in his behalf. This petition will be timely filed in accordance with the rules of the Supreme Court.

I have had no previous connection with this litigation. For me as counsel to review the briefs and records in this proceeding, as well as the papers in the underlying litigation in both state and federal court, in order to prepare an appropriate

petition for writ of certiorari will require the full period between now and November 14.

It is respectfully requested that this Court extend its stay of operation of the writ of mandamus and allow Judge Will and me as his new counsel the full period in which to petition the Supreme Court for review.

Respectfully submitted,

/s/ MILTON V. FREEMAN

Milton V. Freeman
Hadrian R. Katz
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
202-872-6700

Counsel for the Honorable
Hubert L. Will

Octobet 14, 1977

(Certificate of Service Omitted in Printing.)

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 17, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. _____
Hon. _____

(Title Omitted in Printing.)

This matter comes before the court on the "MOTION OF HONORABLE HUBERT L. WILL TO EXTEND THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS UNTIL NOVEMBER 14, 1977" filed herein on October 14, 1977. On consideration thereof, this court being fully advised concerning the circumstances of this matter,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED. The operation of the writ of mandamus issued by this court on August 15, 1977 is hereby STAYED to and including November 14, 1977.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 15, 1977

Thomas F. Strubbe, Esquire
Clerk, U.S. Court of Appeals
Seventh Circuit
Chicago, Illinois

Re: Will, etc. v. Calvert Fire Ins. Co.,
et al., No. 77-693—Your No. 76-1495

Dear Mr. Strubbe:

At the request of counsel, I am enclosing a certificate evidencing the docketing of the above-entitled case.

Very truly yours,

Michael Rodak, Jr., Clerk

By LORETTA S. RUFFIN

(Mrs.) Loretta S. Ruffin
Assistant Clerk

Enclosure

Supreme Court of the United States

I, MICHAEL RODAK, JR., Clerk of the Supreme Court of the United States, do hereby certify that a petition for a writ of certiorari directed to the

U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

was filed in the office of the Clerk of the Supreme Court of the United States on the fourteenth day of November, A.D. 1977, in the case here entitled

HUBERT L. WILL, JUDGE,
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Petitioner

vs.

CALVERT FIRE INSURANCE COMPANY, ET AL.

and that the case has been docketed as No. 77-693, and is now pending.

In testimony whereof I hereunto subscribe my name and affix the seal of the Supreme Court of the United States, at the City of Washington, this fifteenth day of November, A.D. 1977.

MICHAEL RODAK, JR.

Clerk of the Supreme Court
of the United States.

By LORETTA S. RUFFIN

Assistant Clerk

Supreme Court, U. S.
FILED
DEC 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MICHAEL L. WEISSMAN,
AARON, AARON, SCHIMBERG & HESS,
33rd Floor East,
One First National Plaza,
Chicago, Illinois 60603,
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LOUIS LOSS,
1545 Massachusetts Avenue,
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617-495-4626,
Attorneys for Respondent, Calvert Fire Insurance Company.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693.

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTION PRESENTED.

Does *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), authorize a federal district court to defer to a state court when (1) the federal court has exclusive jurisdiction and (2) there are no exceptional circumstances warranting either application of the abstention doctrine or deference for reasons of wise judicial administration?

STATEMENT OF THE CASE.

Without necessarily endorsing the petition's description (pp. 5-11) of the opinions of Judge Will and the court below, as well as the opinion of this Court in the *Colorado River* case—all of which speak for themselves—we accept the petition's statement of the facts (pp. 3-5). However, we must immediately disavow the statement in the petition that, "By the simple expedient of filing two suits, [Calvert] has endeavored to obtain two trials" (p. 15). Quite the contrary, the opinion below (together with the appendices to this brief) demonstrates that Calvert's aim throughout has been the securing of a federal forum for determination of a question of federal law, only to be rebuffed by both federal and state courts until the grant of its petition for a writ of mandamus:

(1) The first action, which sought a declaratory judgment, was filed by American Mutual in state court.

(2) Although there was diversity of citizenship, Calvert had no reason to remove that action to the federal court until counsel's research revealed the possibility of a "security" question under the Securities Exchange Act's Rule 10b-5, and by that time the thirty-day period for removal (28 U. S. C. § 1446(b)) had expired.

(3) Calvert had no choice but to protect itself on the state side by filing an answer and counterclaim. And it pleaded Rule 10b-5 as one of its defenses. But, because of the federal courts' exclusive jurisdiction under § 27 of the Securities Exchange Act (15 U. S. C. § 78bb), it did not include Rule 10b-5 in its counterclaim.

(4) On the very same day, January 10, 1975, Calvert filed an action against American Mutual in the federal court for rescission and damages under Rule 10b-5.

(5) Although the federal court was manifestly the only court with jurisdiction over the entire controversy, American Mutual

on February 5, 1975, filed a motion in that court for abatement or (on the contention that no "security" was involved) dismissal. On May 6, 1975, the federal court stayed everything except the Rule 10b-5 claim, but it has not ruled on the motion to dismiss.

(6) Far from wanting two trials, Calvert moved the state court, on March 10, 1975, to stay its proceedings (App. A). At that point the federal court had already received briefs on the federal "security" point (App. B, ¶ 8, p. B-5) and the state court had not even established a briefing schedule (*id.*, ¶ 12, p. B-6).

(7) American Mutual, nevertheless, opposed the motion for a stay, which was denied. And, perforce, Calvert has continued to protect itself in the state action by filing in the Illinois Supreme Court a petition for leave to appeal from the interlocutory ruling of the Illinois Appellate Court that affirmed the trial court's negative decision on the "security" question. *American Mutual Reinsurance Co.* v. *Calvert Fire Insurance Co.*, 367 N. E. 2d 104 (Ill. App. 1977).

(8) Having failed to persuade the *state* court to stay its proceedings, Calvert, on April 24, 1975, asked the *federal* court to enjoin American Mutual from proceeding on the state side (App. B). This, too, was unsuccessful.

(9) So were two other attempts to persuade the federal court to reconsider its stay order, as well as an attempt to seek interlocutory review under 28 U. S. C. § 1292(b).

(10) Having exhausted all other efforts to have the federal "security" question decided in a federal forum, Calvert at long last succeeded via the mandamus route.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

Summary of Argument.

The petition should be denied because there is neither an issue of sufficient importance nor a conflict among the circuits. The

case involves no more than a determination by the court below to bring its decisions on abstention in line with *Colorado River*.

1. The Decision Below Does Not Raise a Question of Importance.

First: The Court in *Colorado River* held (1) that the District Court's dismissal could not be supported by the abstention doctrine in any of its forms, but (2) that there were nevertheless "exceptional" circumstances, "considerably more limited than the circumstances appropriate for abstention," that permitted "the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration" (424 U. S. at 818). The three dissenting Justices disagreed only on the second point. The Court was unanimous on the abstention point.

Second: It is too clear to require argument that this case does not fall within any of the abstention categories explicated in *Colorado River*. And the lower court carefully considered the other factors that this Court enumerated as justifying dismissal (560 F. 2d at 796):

> The federal forum was not inconvenient for the parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings.

Third: This is not a case of wholly federal concurrent jurisdiction. Nor is it a case of concurrent jurisdiction of federal and state courts over questions of state law. The "security" question is one of *federal* law, which evokes "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (424 U. S. at 817).

This obligation would exist, under *Colorado River*, even if the state courts were given concurrent jurisdiction over actions under the Securities Exchange Act, as was the situation with respect to the water rights involved in *Colorado River*. The petition is thus in the position of arguing for a *narrower* reading of *Colorado River's* learning in circumstances where that learning applies *a fortiori*.

Fourth: The lower court correctly concluded that *Colorado River* required it to overrule its decision in *Aetna State Bank* v. *Altheimer*, 430 F. 2d 750 (1970). The split among the eight sitting judges of the Seventh Circuit went solely to whether the decision to overrule should have been made in the context of an appeal rather than a mandamus proceeding (560 F. 2d at 796, n. 5). This is the *only* aspect of the opinion that makes it other than routine. And it is not sufficient to create a question that warrants this Court's attention.

Fifth: Far from ignoring the distinction between a dismissal (as in *Colorado River*) and a stay, as the petition alleges, the court below concluded that "the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case" (560 F. 2d at 796).

Sixth: There is an equally short answer to the point made in the petition that Rule 10b-5 is pleaded as an affirmative defense in the state court action: It is one thing to permit a state court to entertain a federal *defense* of violation of Rule 10b-5 notwithstanding the federal courts' exclusive jurisdiction; for otherwise a plaintiff might obtain a judgment under state law without the court's adjudicating a defense based on the supreme law of the land. It is quite another thing for a federal court to sit on its hands pending adjudication of such a defense by the state court when the state court defendant is alleging a violation of Rule 10b-5 as a basis for relief in the federal court.

Seventh: In the last analysis—and notwithstanding the petition's attempt to make a fortress out of the volume of business in the federal courts*—the petition would have the only court with jurisdiction over Calvert's claim yield to a court that is simply without jurisdiction to grant any affirmative relief to which Calvert might be entitled under Rule 10b-5. And, even if it be assumed *arguendo* that a successful 10b-5 *defense* in the state courts would give Calvert substantially complete relief, abandonment here of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (424 U. S. at 817) would ignore two considerations bearing on the most efficient functioning of the country's dual system of courts:

(1) In considering the limits of pendent jurisdiction, the Court has cautioned that "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of applicable law." *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 726-27 (1973). Here, conversely, a "surer-footed reading" of the applicable *federal* law of securities regulation will be rendered by the considerably more experienced federal courts.

(2) If tried in a federal court, the basic question whether the reinsurance agreement here involved a "security" will be reviewable in a federal appellate court, whereas federal judicial review of the state courts' resolution of that federal issue would be possible only on review by this Court in the exercise of its certiorari jurisdiction.

Eighth: The petition's alarums about depriving district judges of "discretion to order their calendars to promote efficiency"

* The Court has had occasion quite recently to express its disapproval of the "crowded docket" rationale as an excuse for avoiding decision of federal claims: "* * * an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976).

(p. 15) suffer from hyperbole. *Colorado River* recognized that there *were* circumstances apart from the traditional abstention categories that permitted federal judges to defer to their state brethren. That was the very point on which three Justices dissented. But the court below concluded that none of those circumstances was present here.

Consequently, unless the petition would have this Court overrule a landmark decision that is not yet two years old, all it amounts to is an attack on the lower court's application of the principles of *Colorado River* to the precise circumstances of this case—hardly a reason for the Court's exercise of its certiorari jurisdiction.

2. There Is No Conflict among the Circuits.

First: It is not enough that there be a "potential conflict," as the petition contends (p. 19). The conflict must be one that is "real and embarrassing." *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951).

Second: The three cases cited in the petition establish no conflict, actual or "potential," even apart from their all having preceded *Colorado River:* The Ninth Circuit in *Lecor, Inc.* v. *United States District Court for the Central District of California*, 502 F. 2d 104 (1974), reached the same result as the Seventh Circuit in the case at bar. In the process the court distinguished the earlier case of *Lear Siegler, Inc.* v. *Adkins*, 330 F. 2d 595 (9th Cir. 1964), the second of the petition's trilogy. And *Jewell* v. *Davies*, 192 F. 2d 670 (6th Cir. 1951), *cert. denied*, 343 U. S. 904 1952), involved title to real estate, one of the "exceptional circumstances" referred to in *Colorado River*.

Third: Instead of creating a conflict, the decision below has brought the Seventh Circuit into harmony with decisions in other circuits holding that mandamus will issue to prevent abstention in cases involving exclusive jurisdiction under the

federal securities laws. *Cotler* v. *Inter-County Orthopaedic Association, P. A.*, 526 F. 2d 537 (3d Cir. 1975); *Movielab, Inc.* v. *Berkey Photo, Inc.*, 321 F. Supp. 806 (S. D. N. Y. 1970), *aff'd on other grounds*, 452 F. 2d 662 (2d Cir. 1971).

Fourth: Surely no "conflict" warranting exercise of the Court's certiorari jurisdiction is created by the remarks of the learned judges below who favored a rehearing *en banc*. Those judges have decided nothing; their remarks merely reflect dissatisfaction with the decision not to rehear the matter. If there had been a rehearing *en banc*, all four might well have concurred with the panel that decided the matter. What is important to note is that those who favored a rehearing *en banc* were not able to muster a majority of the court.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL L. WEISSMAN,
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Chicago, Illinois 60603,
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LOUIS LOSS,
1545 Massachusetts Avenue,
Cambridge, Massachusetts 02138,
617-495-4626,
Attorneys for Respondent, Calvert Fire Insurance Company.

December, 1977.

APPENDIX A.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY,
Plaintiff.
vs.
CALVERT FIRE INSURANCE COMPANY,
Defendant.
No. 74 L 10737

NOTICE OF MOTION

To: Thomas J. Weithers and
John L. Kirkland
Hinshaw, Culbertson, Moelman, Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602

On March 10, 1975, at 9:30 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Arthur L. Dunne (Room 2510), or any judge sitting in his stead, in the courtroom usually occupied by him in the Chicago Civic Center, Chicago, Illinois, and present the motion of defendant to stay proceedings.

Name Michael L. Weissman
Aaron, Aaron, Schimberg & Hess
Address 33rd Floor East
One First National Plaza
Telephone 236-8552
Attorney for Calvert First Insurance Company
City Chicago, Illinois 60603

Copy received_____, 19____, at _____, ____m.

PROOF OF SERVICE BY DELIVERY

I, Michael L. Weissman, attorney for the defendant, certify on March 6, 1975, I served this notice by delivering a copy personally to each person to whom it is directed.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

(If not the attorney)
Signed and sworn to before me
....., 19.....

.....
Notary Public

PROOF OF SERVICE BY MAIL

I, ...:
(the attorney, certify) (a non-attorney, on oath state)
I served this notice by mailing a copy to.....
at .....
(address which appears on envelope)
and depositing the same in the U.S. mail at .....,
(place of mailing)
at.....m. on ....., 19....., with proper postage prepaid.

(If not the attorney)
Signed and sworn to before me
....., 19.....

.....
Notary public

NOTE: If more than one person is served by mail, additional proof of service may be made on the reverse side.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department—Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, *Plaintiff,* *vs.* CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

DEFENDANT'S MOTION TO STAY PROCEEDINGS

Now comes the defendant, CALVERT FIRE INSURANCE COMPANY ("Calvert") by its attorney, Michael L. Weissman, and moves for a stay of these proceedings for the following reasons:

1. On January 10, 1975 Calvert filed its Answer and Counterclaim in this cause.

2. On January 10, 1975 Calvert also filed an action against plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY ("Amreco"), in the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 75 C 103. Said action has been assigned to and is being heard by the Honorable Hubert L. Will.

3. Calvert's counterclaim in this proceeding and its complaint the federal court action involve the question of whether or not Amreco's offer and sale to Calvert of a participatory interest in the 1974 Multiple Line Pool constituted a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

4. Amreco has moved in the federal court action to abate the proceeding or, in the alternative, to dismiss it. The issue raised by such motion is whether or not Amreco offered and sold a

"security" to Calvert within the meaning and intention of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. On February 14, 1975 Judge Will entered an order establishing a briefing schedule on the federal securities law questions. A decision on these questions has been scheduled by Judge Will for March 31, 1975.

6. The decision to be rendered by Judge Will on March 31, 1975 will affect, and may be totally dispositive of, both the federal court action and this proceeding. It would not be conducive to judicial economy for this Court to conduct further proceedings until the federal securities law questions have been fully resolved.

WHEREFORE, defendant, CALVERT FIRE INSURANCE COMPANY, prays that this Court stay all proceedings herein pending a final resolution of all issues under the federal securities acts.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Its Attorney

MICHAEL L. WEISSMAN
AARON, AARON, SCHIMBERG & HESS
33rd Floor—East
One First National Plaza
Chicago, Illinois 60603
236-8552

STATE OF ILLINOIS }
COUNTY OF COOK } ss

AFFIDAVIT OF SERVICE

I, MICHAEL L. WEISSMAN, first being duly sworn on oath, depose and say that I served a copy of the within and foregoing Defendant's Motion to Stay Proceedings to Thomas J. Weithers, Esq., and John L. Kirkland, Esq., attorneys for the plaintiff, at Suite 2700, 69 West Washington Street, Chicago, Illinois 60602, by causing a true and correct copy thereof to be delivered to them at said address this 6th day of March, 1975.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

Subscribed and Sworn to before me this 6th day of March, 1975.

/s/ SYLVIA D. HAVIDIC
Notary Public

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation,
Defendant.

No. 75 C 103

NOTICE OF MOTION

To: Messrs. Thomas J. Weithers
and John L. Kirkland
Hinshaw, Culbertson, Moelman,
Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on Thursday, April 24, 1975, at the hour of 10:00 A. M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Hubert L. Will, United States District Judge, in the courtroom usually occupied by him in the Federal Building, 219 South Dearborn Street, Chicago, Illinois, and there and then present plaintiff's Verified Petition for a Preliminary Injunction, a copy of which is attached hereto and served upon you, at which time and place you may appear if you so desire.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Michael L. Weissman
Attorney for Plaintiff

AARON, AARON, SCHIMBERG & HESS
33rd Floor East
One First National Plaza
Chicago, Illinois 60603
236-8552

CERTIFICATE OF SERVICE

MICHAEL L. WEISSMAN, the attorney for CALVERT FIRE INSURANCE COMPANY, plaintiff herein, hereby certifies that he caused a copy of the within and foregoing Notice of Motion and a copy of the Verified Petition for a Preliminary Injunction referred to therein to be delivered to Messrs. Thomas J. Weithers and John L. Kirkland, attorneys for AMERICAN MUTUAL REINSURANCE COMPANY, defendant herein, at their offices at 69 West Washington Street, Chicago, Illinois, this 23rd day of April, 1975.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation,
Defendant.

No. 75 C 103

VERIFIED PETITION FOR A PRELIMINARY INJUNCTION

Now comes CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation, plaintiff in the above-entitled proceeding, by Michael L. Weissman, its attorney, and states as follows:

1. On January 10, 1975, CALVERT FIRE INSURANCE COMPANY ("Calvert") filed this action against AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation ("Amreco"), alleging, in substance, that a participatory interest in a reinsurance Pool had been sold to it by Amreco in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and related state securities laws.

2. The filing of this action had been preceded by the filing of a declaratory judgment proceeding by Amreco in the Circuit Court of Cook County, Illinois, Docket No. 74 L 10737. At the date on which this action was filed, there was pending in said state court proceeding a Motion to Dismiss filed by Calvert which contended that Amreco was without authority to institute

a declaratory judgment proceeding on behalf of all of the 99 insurance companies which were members of the reinsurance Pool. At that date, no discovery proceedings were in process, Amreco having agreed to the entry of an order staying all depositions pending the disposition of all Motions to Dismiss.

3. Concurrently with the filing of this action, Calvert filed its Answer and Counterclaim in the declaratory judgment proceeding in the Circuit Court of Cook County, Illinois. In order to avail itself of all possible defenses, Calvert raised in its Answer and Counterclaim in said state court proceeding the violations of the 1933 and 1934 Acts and the state securities laws which it contends were committed by Amreco.

4. Thereupon, Amreco filed a Motion to Abate or, in the Alternative, to Dismiss this cause on the grounds that the participatory interest which Amreco offered and sold to Calvert was not a security within the meaning of the 1933 and 1934 Acts and the said state securities laws.

5. This Court then established a briefing schedule which called for Amreco's Memorandum in support of its Motions to be filed by February 21, 1975, for Calvert's answering Memorandum to be filed by March 3, 1975 and for Amreco's reply Memorandum to be filed by March 10, 1975. Both Calvert and Amreco complied with the briefing schedule established by this Court.

6. On April 9, 1975, this Court held that it had jurisdiction of Calvert's claim for damages under the 1934 Act and indicated that a ruling on whether the participatory interest in the reinsurance Pool was a security could be expected in the near future.

7. The issues raised by Amreco's Motion to Dismiss may be dispositive of the entire controversy between the parties. That is to say, should this Court determine that the participatory interest in the reinsurance Pool which Amreco offered and sold to Calvert was a security which was offered and sold without prior registration, then it follows that Calvert's exercise of its right of

rescission was both timely and valid and that there is no basis whatsoever upon which Amreco can make any claim against Calvert.

8. In an effort to avoid unnecessary duplication of effort, your petitioner presented a motion to The Honorable Arthur L. Dunne, Judge of the Circuit Court of Cook County, Illinois, on March 10, 1975 requesting a temporary stay of the state court proceeding pending a definitive resolution of the federal securities laws issues in this Court. The motion was based upon the fact that a resolution of these issues would undoubtedly proceed more rapidly before this Court since this Court had already directed that briefs be submitted thereon and said briefs had, in fact, been filed in response to said order.

9. Although counsel for Amreco had raised the issue of the applicability of the federal securities laws and the McCarran-Ferguson Act by motion to this Court and had actively participated in the preparation of briefs in response to this Court's order, he opposed the motion for a stay of proceeding before Judge Dunne. As a consequence, Judge Dunne denied the motion to stay filed by Calvert.

10. In the course of the argument on the motion to stay before Judge Dunne on March 10, 1975, there occurred the following colloquy:

> "MR. WEISSMAN: Your Honor, the issues that are before the Federal Court are issues arising under the Federal Securities law of 1933, the Federal Securities Exchange Act, 1934, the McCarron-Ferguson Act, all statutes, basically, essentially, federal jurisdictions, federal competence, which, frankly, with all due deference to our eminent jurists in the State Court System, are much more frequently dealt with by the judges in the Federal Court System, and I think, frankly, they can more expeditiously rule on them than perhaps can be done—
>
> THE COURT: I read an article in the paper—I won't mention the name of the paper—that 13 judges in the Federal Court disposed of 270 criminal cases in the first

six months over there in the Federal Court. The State judges disposed of 250 or 300 cases a year. So I take it that means that we are working seven times as hard as a Federal Judge.

I agree with you absolutely that the Federal Judges are far more familiar with the Act that you mentioned than I am. I have not looked at them since I was in the U. S. Attorney's Office.

I, along with others of my judges, grow increasingly disturbed by the expansion of the hoary lawyers' gambit of forumshopping, if you will. I have no criticism of your filing of this matter in that court, and you have an absolute right to, but I see this time and time again, especially in this court, where lawyers for one side or the other will say, "Judge, we filed the same matter in the Federal Court," and then, along with waiting for the State Appellate procedure, I take it we are obligated to wait for the Federal Appellate procedure. I do not feel that it is appropriate or necessary in these cases, especially in a case of this nature, which I have reviewed on several occasions and which I consider relatively simple."

11. Inasmuch as your petitioner has made a bona fide and good faith effort to induce the Judge of the Circuit Court of Cook County, Illinois, before whom the state court proceeding is presently pending to stay such proceeding pending a resolution of the federal securities laws issues and has been denied such relief, it is necessary and appropriate that your petitioner request that this Court enjoin Amreco and its counsel from engaging in further proceedings in the Circuit Court of Cook County, Illinois.

12. The necessity for such relief is demonstrated by the fact that on Friday, April 25, 1975, at the hour of 9:30 A.M., counsel for Amreco intends to appear before Judge Dunne on Amreco's Motion to Dismiss Calvert's Counterclaim (Exhibit "A" hereto) pursuant to a Notice of Motion served April 22, 1975 (Exhibit "B" hereto). Amreco intends to establish a briefing schedule on the very issues which this Court has indicated it will rule upon.

13. Calvert will be irreparably injured unless injunctive relief is granted by this Court since it will then have to raise the same issues as have been briefed before this Court by motion before Judge Dunne, will subject itself to possibly inconsistent rulings by this Court and by Judge Dunne and may then have to pursue one or more appeals in order to reconcile such rulings, all of which will be costly and can be avoided by the granting of the requested relief at this stage of the proceedings.

14. The appropriateness of the relief requested by your petitioner is demonstrated by the fact that it was Amreco which first presented the issues in question by the filing of its Motion to Dismiss in this Court rather than in the Circuit Court of Cook County, Illinois. Amreco should not be permitted to undermine the jurisdiction of this Court, particularly since it was Amreco which first brought these issues on for decision by this Court.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY prays that this Court enter a preliminary injunction enjoining AMERICAN MUTUAL REINSURANCE COMPANY, and its counsel, from engaging in any further proceedings in the declaratory judgment action now pending in the Circuit Court of Cook County, Illinois, Docket No. 74 L 10737, until such time as there has been a ruling in this Court on the issues now pending before this Court.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Michael L. Weissman
Its Attorney

AARON, AARON, SCHIMBERG & HESS
33rd Floor East
One First National Plaza
Chicago, Illinois 60603
236-8552

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

AFFIDAVIT

MICHAEL L. WEISSMAN, being first duly sworn on oath, deposes and says that he is the attorney for CALVERT FIRE INSURANCE COMPANY, the petitioner in the above-entitled petition; that he has personal knowledge of the facts set forth in the foregoing petition; and that the statements contained in the foregoing petition are true in substance and in fact according to the best of his knowledge and belief.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

Subscribed and sworn to before me this 23rd day of April, 1975.

/s/ SYLVIA D. HAVIDIC
Notary Public

EXHIBIT "A"

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, *Plaintiff,*	No. 74 L 10737
vs.	
CALVERT FIRE INSURANCE COMPANY, *Defendant.*	

MOTION TO DISMISS COUNTERCLAIM

Now comes the plaintiff, counter-defendant, AMERICAN MUTUAL REINSURANCE COMPANY, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and respectfully moves this Court to strike and dismiss the Counterclaim filed herein by defendant, counter-plaintiff, CALVERT FIRE INSURANCE COMPANY, and for reason thereto, states as follows:

Count I

1. That defendant, counter-plaintiff's Counterclaim, Count I, Paragraphs One, Two, Three and Six thereof, purport to allege that its reinsurance contract with AMRECO constitutes a "security as defined by § 2(1) of the Securities Act of 1933, as amended, and that "the security was not registered in violation of § 5 of the Securities Act of 1933."

2. That on the basis of the provisions of the Securities Act of 1933, counter-plaintiff alleges that it is entitled to recision on the basis of § 12(1) of the Securities Act of 1933.

3. That counter-plaintiff's Counterclaim fails to state a claim upon which relief may be granted because:

(a) The McCarren-Gerguson Act, 15 U.S.C.A. §§ 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a State;

(b) Counter-plaintiff, CALVERT FIRE INSURANCE COMPANY, was not, as a matter of law, a purchaser of a security, but rather, a seller of reinsurance contracts;

(c) Counter-defendant, AMRECO's contract with counter-plaintiff, CALVERT, does not constitute a "security" as that term has been defined by § 2(1) of the Securities Act of 1933;

(d) Counter-defendant, AMRECO's reinsurance contract with counter-plaintiff, CALVERT, is exempt from registration under § 3(a)(8) of the 1933 Act.

Count II

1. That defendant, counter-plaintiff's Counterclaim, Counts II and III thereof, purport to allege that its reinsurance contract with AMRECO constitutes a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill. Rev. Stat. Ch. 121½ § 137-2.1, and Rule 130 promulgated thereunder and as defined by § 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. Act 32A, § 26(a)(5), respectively.

2. That defendant, counter-plaintiff's Counterclaim, Counts II and III thereof, fail to state a claim upon which relief may be granted because AMRECO's reinsurance contract does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"),

Ill. Rev. Stat., Ch. 121½ § 137-2.1 and Rule 130 promulgated thereunder and as defined by § 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. Act 32A § 26(a)(5), respectively.

Count III

Now comes plaintiff, counter-defendant, AMRECO, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and in answer to Count IV of counter-plaintiff's Counterclaim, states as follows:

1. The defendant denies each and every allegation contained in Paragraph One of Count IV of counter-plaintiff's Counterclaim.

2. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Two of Count IV of counter-plaintiff's Counterclaim.

3. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Three of Count IV of counter-plaintiff's Counterclaim.

4. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Four of Count IV of counter-plaintiff's Counterclaim.

WHEREFORE, AMERICAN MUTUAL REINSURANCE COMPANY, denies that the defendant, CALVERT FIRE INSURANCE COMPANY, is entitled to a judgment in the sum of two million dollars ($2,000,000.00) or any other relief whatsoever.

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER

By: .....

Attorneys for Plaintiff, Counter-Defendant, American Mutual Reinsurance Company

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
69 West Washington Street—Suite 2700
Chicago, IL 60602
630-4400

EXHIBIT "B"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc.,
Plaintiff,
vs.
CALVERT FIRE INSURANCE COMPANY,
Defendant.
No. 74 L 10737

NOTICE OF MOTION

To: Aaron, Aaron, Schimberg & Hess
Mr. Michael L. Weissman
One First National Plaza
Chicago, Illinois 60670

On Friday, April 25, 1975, at 9:30 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Arthur L. Dunne, room 2510 or any judge sitting in his stead, in the courtroom usually occupied by him in the Chicago Civic Center, Chicago, Illinois and will then and there move for leave to file instanter the "Brief in Support of American Mutual Reinsurance Company's Motion to Dismiss," and will further move for the setting of a briefing schedule.

Name Hinshaw, Culbertson, Moelmann, Hoban & Fuller
Attorney for Plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY
Address 69 West Washington Street
City Chicago, Illinois 60602
Telephone 630-4400

Copy received * *, 19....., at....., ...m.
** together with copy of "Motion to Dismiss Counterclaim"

AARON, AARON, SCHIMBERG & HESS
By /s/ MICHAEL L. WEISSMAN

CERTIFICATE OF ATTORNEY

I certify that on ....., 19....., I served this notice by ..... a copy to each person to whom
(delivering) (mailing)
it is directed.

.....
Attorney

AFFIDAVIT OF SERVICE

..... on oath states: On April 22, 1975, I served this notice by delivering a copy to each person to whom it is directed.

Signed and sworn to before me
April 22, 1975

.....
Notary public

Supreme Court, U. S.
FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois

Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Respondent,

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

MILTON V. FREEMAN
DENNIS G. LYONS
WERNER J. KRONSTEIN
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Of Counsel:

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Chicago, Illinois

IN THE

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Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER

1. The Brief in Opposition admits that the issue is whether this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), deprived district judges of all discretion to arrange their calendars to avoid duplication and otherwise manage the disposition of their cases in the interest of economy and efficiency. It states:

> "The lower court correctly concluded that *Colorado River* required it to overrule its decision in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (1970)." Brief in Opposition at 5.

As explained in the petition, *Aetna* was the Seventh Circuit's statement of the rule of *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), that

> "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."

2. Plainly this issue is of transcendent importance. As explained in the petition at 15-16, the rule of *Landis* has provided the overburdened federal courts with the discretion necessary to discourage duplicative litigation, and to defer deciding questions that may ultimately become moot. The decision below, purportedly based on a decision of this Court, will encourage litigants nationwide to bring lawsuits (including Rule 10b-5 lawsuits) simultaneously in two courts to secure two adjudications. The additional burden on federal judges of such duplicative litigation would be enormous, and the ultimate result would be to delay justice for those litigants who have no alternative state court in which to try the identical issues.[1]

3. Calvert's suggestion that *Colorado River* overruled the power of district courts over their own calendars set forth in *Landis* v. *North American Co.* is so difficult to sustain that Calvert avoids any discussion of *Landis* whatever.[2] In fact, far

[1] While Calvert contends that its "aim throughout has been the securing of a federal forum for determination of a question of federal law," it admittedly chose not to remove the state case to federal court on diversity grounds. Brief in Opposition at 2. Apparently, Calvert wanted a federal forum to decide only technical questions under the securities laws, not the underlying issue of whether it had been misled into joining the reinsurance pool, an issue certainly open to decision in the state court.

[2] The temptation to deal with *Landis*, the principal authority relied upon in the petition, must have been very great, because Calvert listed the case in its Table of Authorities at the front of its brief (at ii). Nevertheless, the temptation was finally resisted and no mention of the case appears anywhere in the body of the Brief in Opposition.

from overruling *Landis* as claimed, *Colorado River* cited *Landis* as authority. *See* 424 U.S. at 817, 819. As the dissenting *Colorado River* justices made very clear, that case *extended* the principle of *Landis*, applying it not only to stay orders but even to final dismissals of federal actions, where federal jurisdiction was conceded.[3]

4. As explained in the petition, however, it is irrelevant whether or not Judge Will would have been justified in dismissing Calvert's complaint under *Colorado River*. Calvert's federal case was not dismissed; Judge Will merely decided to postpone resolution of an issue that might become entirely moot as a result of prior pending state court litigation between the identical parties raising the identical legal and factual issues. Calvert's right to a federal forum to decide any issues that could not be resolved in the state litigation has not been denied, but merely postponed to avoid simultaneous duplicative litigation in state and federal courts between the same parties.

[3] Despite Calvert's assertion that "the petition would have this Court overrule a landmark decision [*Colorado River*] that is not yet two years old," Brief in Opposition at 7, our petition requests not that *Colorado River* should be overruled, but that the decision below should be reversed summarily as inconsistent with *Colorado River*, and that a landmark decision over forty years old, *Landis* v. *North American Co.*, should be sustained.

The decision below concededly takes away from judges of the district court discretion to order their calendars so they are not mere pawns of litigants seeking presumed advantage from duplicative litigation in two court systems. If not promptly reversed, it will have the undesirable nationwide consequences pointed out in our petition. It should be summarily reversed.

Respectfully submitted,

MILTON V. FREEMAN
DENNIS G. LYONS
WERNER J. KRONSTEIN
HADRIAN R. KATZ

1229 19th Street, N.W.
Washington, D.C. 20036

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Dated: December 28, 1977

Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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v.

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and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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IN THE

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and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the court of appeals (Appendix 1 to the Petition for Certiorari) is reported at 560 F.2d 792.

Jurisdiction

The writ of mandamus was issued by the court of appeals on August 15, 1977. The petition for certiorari was filed on November 14, 1977. Certiorari was granted on January 9, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the district courts of the United States have been deprived by this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), of all discretion to stay proceedings pending before them in the interest of judicial economy and to avoid duplicative litigation.

2. Whether the United States district courts have a clear legal duty enforceable by mandamus "immediately" to try cases before them despite the fact that prior-commenced litigation between the same parties raising the same legal and factual issues is proceeding in a state court in a manner that may well render the entire federal case moot.

3. Whether this Court's opinion in *Colorado River* entitles a litigant effectively to compel a United States district judge by writ of mandamus to engage in a race with a state court to decide identical legal issues pending in both courts between the same parties, when the judge reasonably believes such a race to be unnecessary and wasteful.

Statutory Provision Involved

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Facts

The recitation of facts is selected from the opinion below substantially in that court's own language.[1]

Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool."

Calvert [became] a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials. In April 1974, Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool. Calvert notified American Mutual that it intended to rescind its agreement to participate in the pool. Litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert*	*Calvert* v. *American Mutual*
Circuit Court of Cook County, Illinois	**United States District Court for the Northern District of Illinois**
July 3, 1974	
American Mutual [individually and for the use of the other 98 insurance companies in the reinsurance pool] sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.[2]	

[1] Additions are listed in brackets; deletions are not indicated.

[2] The complaint without exhibits appears as Appendix 3 to the Petition for Certiorari.

Calvert filed an answer alleging that the agreement was void because American Mutual violated [Section 5 of] the 1933 Securities Act, [Rule 10b-5 promulgated under] the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.

With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act.[3]

January 10, 1975

Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds [state and federal] as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as [damages] for alleged violations of Rule 10b-5 of the Securities Exchange Act.[4]

Judge Will stayed proceedings in the case before him pending the outcome of the state proceedings listed above. The court of appeals issued a writ of mandamus compelling him "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934."

Judge Will's Opinion

On May 6, 1975 Judge Will issued the memorandum opinion and order at issue here. The order stayed proceedings

[3] The answer and counterclaim appear as Appendix 4 to the Petition for Certiorari.

[4] The federal complaint without exhibits appears as Appendix 5 to the Petition for Certiorari.

in the federal court on all claims alleged in Calvert's complaint, except the claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The opinion and order appear as Appendix 2 to the Petition for Certiorari. The result has been to postpone all adjudication in federal court pending the outcome of the state proceedings.

Judge Will's May 6, 1975 opinion is a careful exposition of the applicable standards governing a decision to stay and a detailed analysis of the reasons why a stay should be issued in the present case.

Judge Will, in the exercise of his judicial discretion, determined that retaining jurisdiction over Calvert's federal claims, but awaiting further developments in the state litigation before rendering a decision, was appropriate and that "in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative."

He continued: "The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the 1934 Act monetary damages question, but it also includes those issues underlying [American Mutual's] declaratory judgment action which are not present here. Accepting the fact that the

state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna* [*State Bank* v. *Altheimer,* 430 F.2d 750 (7th Cir. 1970)], we find that Calvert's federal suit should be stayed pending disposition of the state court suit."

Judge Will also noted the need to avoid an "unseemly race to judgment with its concomitant harrassment and confusion." He concluded: "To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts."

He further noted: "While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here."

After attempts to secure reconsideration, Calvert petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus.

Opinion of the Court Below

Mandamus was granted by the court of appeals, relying exclusively on this Court's opinion in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). The court of appeals made clear that Judge Will's action had been entirely "correct" under existing Seventh Circuit law as stated in *Aetna State Bank* v. *Altheimer,* 430 F.2d 750 (7th Cir. 1970), but held that the discretionary doctrine of *Aetna* had been overruled by *Colorado River.*

The opinion below states:

> "The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction." 560 F.2d at 793.[5]

The court stated that under the existing Seventh Circuit rule of *Aetna State Bank* v. *Altheimer, supra,* which recognized "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," 430 F.2d at 755, Judge Will's stay order "was correct at the time it was entered," in May 1975. 560 F.2d at 795.

The court of appeals held, however, that the subsequent decision of this Court in *Colorado River Water Conservation District* v. *United States, supra,* overruled the *Aetna State Bank* case, eliminated the power of a district court to control its docket, and compelled the district court to undertake immediately its "obligation to exercise its jurisdiction." 560 F.2d at 795-97.

---

[5] The sole difference between the claims in the state court and the federal court relates to the allegations concerning Rule 10b-5 under the Securities Exchange Act of 1934.

In the state court, fraudulent representations in violation of Rule 10b-5 are alleged as a defense to the complaint, but no affirmative damages for violation of Rule 10b-5 are claimed. Instead, a two million dollar counterclaim for damages is based exclusively on supposed violations of other state and federal laws. In the federal court, a claim for two million dollars in damages is also alleged, based upon violation of Rule 10b-5 in addition to the other state and federal grounds alleged as bases for the two million dollars damages in the state court.

Accordingly, all issues relating to liability, including Rule 10b-5, are presented in the state court action, the only issue presented exclusively in the federal court being the extent of damages in the event liability under Rule 10b-5 is found to exist.

On the basis of this view, the court of appeals panel granted a writ of mandamus and ordered Judge Will as noted "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934." *Id.* at 797.

Four of the eight active judges on the court of appeals indicated a desire to have the matter submitted to the court *en banc*. Their views are set forth in note 5 to the opinion below. They said: "In simple terms, the panel's opinion holds that the rationale developed in *Aetna* [*State Bank* v. *Altheimer*] can no longer stand in the light of *Colorado River*. . . ." They stated: "the panel has apparently taken from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " a power these four judges believed to be based on this Court's opinion in *Landis* v. *North American Co.*, 299 U.S. 248 (1936). They regarded the rule of *Landis* and *Aetna* which the panel was abandoning as "a salutary rationale in the context of the overburdened federal courts." 560 F.2d at 796 n.5.

By granting the writ of mandamus, the panel held that the district court had a clear legal duty to proceed regardless of the pendency of the state proceeding, and accordingly had no discretion in the matter. For it is plain that mandamus as an extraordinary remedy will not lie with respect to the exercise of discretion, but only where the duty is not subject to discretion. It is available only in "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will* v. *United States*, 389 U.S. 90, 95 (1967).

Thus, the sole issue raised is whether a United States district judge has *any* discretion to stay proceedings in his court when the identical parties are litigating essentially the identical issues in a previously pending case in a state court. As noted, the court of appeals agreed that, if Judge Will had any

discretion over his calendar his decision to stay proceedings was "correct." Nevertheless, following what it believed to be the implications of this Court's decision in *Colorado River Water Conservation District* v. *United States*, *supra*, the court below denied him any discretion and granted a writ of mandamus to compel him to reorder his calendar and immediately decide issues that otherwise might well become moot as a result of the pending state court litigation.[6]

A petition for certiorari was timely filed and was granted by this Court on January 9, 1978.

SUMMARY OF ARGUMENT

It has been recognized since *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), that district judges possess broad discretion to stay duplicative litigation in the interest of judicial efficiency. The court below held that under the standard of *Landis*, Judge Will exercised his discretion "correctly."

For it was plain that it would be a great waste of judicial and litigants time to have both state and federal courts simultaneously neously processing identical issues of fact and law between the same parties.

However, the court below held that the discretion recognized in *Landis* had been removed by *Colorado River Water*

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[6] Following the Seventh Circuit decision, the defendant-respondent American Mutual determined not to petition for certiorari. Judge Will was convinced that, independent of the private interest of any litigant before him, the Seventh Circuit's decision imposed intolerable burdens on the federal judicial system, and he considered review by this Court to be vital. He therefore requested the Department of Justice to file a petition for certiorari on his behalf, but the Solicitor General's office declined on the grounds of a general policy not to represent judges in mandamus proceedings in private actions as opposed to government cases. Accordingly, to protect himself and other federal judges deprived by the decision below of control over their calendars, he retained private counsel for that purpose, as suggested by the Solicitor General's office.

Conservation District v. *United States*, 424 U.S. 800 (1976). This conclusion is clearly wrong. For, instead of rejecting discretion of lower courts in the interest of judicial economy and avoidance of wasteful and duplicative litigation, this Court in *Colorado River* reached its decision in part on the basis of the importance of avoiding piecemeal litigation. It cited *Landis* with approval in this regard. 424 U.S. at 819. Further, *Colorado River* concerned the dismissal of a federal suit in deference to state proceedings, not a mere temporary stay. And the result in *Colorado River* was to *uphold* the dismissal as justified in the interest of "wise judicial administration."

Plainly, *Colorado River* did not purport to make any general change in existing doctrine. Instead, the case was concerned with determining congressional intent in a particular statute, the McCarran Amendment. In that context it dealt with issues of federalism and special considerations respecting water rights that are simply irrelevant to the instant proceedings. *Colorado River* cannot be regarded as overruling *Landis* v. *North American Co.*, a case the *Colorado River* Court twice cited favorably as authority.

Significantly, the court below misconstrued Judge Will's opinion, concluding that his stay order was the functional equivalent of a dismissal. To the contrary, Judge Will made clear that Calvert's claim remained viable, and that he would resolve all the issues presented at the appropriate time.

In addition, the court below misinterpreted *Colorado River* by failing to recognize two significant elements. First, the court below ignored the explicit evidence that *Colorado River* set standards only for dismissals of federal litigation, not for stays. The consequences of a dismissal, a final refusal to exercise jurisdiction, may be much more serious and, accordingly, a much more severe standard is appropriate. Second, *Colorado River* established that district judges have some discretion over dismissals. Thus *Colorado River* implies that the kind of clear legal duty necessary for mandamus relief is not present.

Indeed, to the extent that *Colorado River* teaches anything about the instant case, it supports Judge Will. The *Colorado River* Court expressly extended the principle of *Landis* to uphold the dismissal of litigation in the interest of unifying proceedings before a single court.

ARGUMENT

I. INTRODUCTION

A. The Issue in the Case

In 1936 this Court determined in *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), that

> "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."

Landis has never been questioned by this Court, and was recently cited with approval in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817, 819 (1976).

The principle of *Landis*, that federal district judges possess inherent power to stay duplicative litigation in the interest of judicial efficiency, was quoted at length and applied by the Seventh Circuit in upholding a stay in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750, 755 (7th Cir. 1970), a case conceded by the court below to be indistinguishable from the instant litigation, *see* 560 F.2d at 795 ("the factual parallelism between [the instant case and *Aetna*] is overwhelming"). Following the rule of *Landis* and *Aetna*, the court below found that Judge Will had exercised his discretion "correctly" in granting a stay.

However, the panel below held that this Court's decision in *Colorado River Water Conservation District* v. *United States*,

supra, effectively overruled the principle of the district court's discretion taught by *Landis* v. *North American Co.*, thereby compelling the court of appeals to overrule *Aetna*.

The sole issue presented by the instant case, therefore, is whether *Colorado River* took away the discretion of district judges recognized by *Landis* to stay duplicative litigation. As will be demonstrated below, *Colorado River* did not overrule *Landis;* it extended *Landis* to permit the avoidance of duplicative and wasteful litigation in cases not covered by *Landis*. The decision below is clearly erroneous, resulting from the panel's misunderstanding of both Judge Will's stay order, and the holding of *Colorado River*.

B. This Court's *Colorado River* Decision

In *Colorado River*, the United States had brought suit in federal court in its own behalf and on behalf of Indian tribes, seeking a declaration of water rights in the Colorado watershed. The district court dismissed the action, stating that the doctrine of abstention required deference to a comprehensive adjudication of water rights pending in a Colorado state court. 424 U.S. at 806. It was noted that federal policy as embodied in the McCarran Amendment, 43 U.S.C. § 666, opposed piecemeal adjudication of water rights, that the federal government was already involved in a number of other Colorado state water rights adjudications, that no substantive proceedings had taken place in federal court, and that the federal courthouse was 300 miles from the water sources at issue. 424 U.S. at 820.

This Court held that the district court had acted properly in dismissing the federal action as a result of the balancing of a number of factors: While there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, dismissal is appropriate in "exceptional circumstances." The Court concluded that:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a

> federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947); the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942); and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v. *North American Co., supra*, at 254-255. Only the clearest of justifications will warrant dismissal." 424 U.S. at 818-19.

All the justices accepted this standard; the majority held that a balancing of these factors favored dismissing the federal court litigation, while three dissenters felt that the prerogative of district courts to dismiss actions should be more limited. No question was raised and no consideration was given by any of the justices, majority or minority, to the power of district judges to control the calendar of cases, and to stay federal proceedings without dismissing the case. Accordingly, no express statement was made concerning the rights of district courts to exercise the inherent right to control their calendars in the interests of judicial economy and avoidance of duplicative litigation, where no order of dismissal is entered and jurisdiction is retained. However, *Landis* v. *North American Co.* was cited with approval.

The panel below, however, stated that it saw no distinction between a stay and a dismissal. Applying the high standards required for dismissal by *Colorado River, i.e.*, exceptional circumstances, the panel below held that the standards had not been met and that no right to dismiss existed; therefore in its view no stay was permissible, the discretion to stay being limited to situations where dismissal was appropriate.

The *Colorado River* case having come before the appellate courts by appeal from a dismissal, no question either of the power to stay or of the use of the extraordinary writ of mandamus was involved, and there was no occasion for any discussion of those subjects.

As noted above, the *Colorado River* decision did not compel a district court to exercise jurisdiction. Instead, it sanctioned a district court's refusal to exercise jurisdiction because of a number of factors associated with "wise judicial administration." While most of the issues addressed in *Colorado River*, questions of federalism and the special nature of water rights, are unrelated to the issues presented by the instant case, *Colorado River* did address itself in part to the importance of judicial efficiency and the wastefulness of duplicative and piecemeal litigation. And in addressing these latter issues, the *Colorado River* decision's emphasis on the desirability of unifying litigation in one forum is strikingly similar in tone to Judge Will's opinion, and in marked contrast to the opinion of the court below.

It is therefore surprising that the panel below found its decision even reconcilable with *Colorado River*, much less compelled by it. In Part II below, it will be demonstrated that the panel's conclusion that *Colorado River* was direct precedent compelling the decision below resulted because the panel first confused Judge Will's stay order with an order of dismissal, and second misinterpreted the *Colorado River* holding by failing to recognize (1) that *Colorado River* expressly applied only to final dismissals, not to stays, (2) that *Colorado River* does not indicate that a clear legal duty, necessary for the grant of mandamus relief, is present, and (3) that *Colorado River* was primarily concerned with issues of federalism that are irrelevant to the instant case. In Part III, it will be shown that to the extent *Colorado River* teaches anything about the instant case, it supports Judge Will.

II. THE DECISION BELOW WAS NOT REQUIRED BY *COLORADO RIVER*

A. The Court Below Fundamentally Confused Judge Will's Stay Order With an Order of Dismissal

The opinion below stated:

> "The instant case differs from *Colorado River* in that the district court did not dismiss Calvert's federal action. Instead, it stayed[4] all but the claim for damages under Rule 10b-5, over which it retained jurisdiction but refused to decide. We do not find this distinction to be important. It is clear that the district court, acting properly under *Aetna*, intended to defer on grounds of federalism to the results reached in the state proceedings. Thus, the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case.
>
> "[4] The district court granted American Mutual's motion to 'abate,' but stated specifically that it was staying all but the Rule 10b-5 damages claim. In *Aetna*, we defined abatement 'as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way.' 430 F.2d at 854. We assume that Judge Will meant to use 'stay' as a synonym for 'abate.'"
>
> 560 F.2d at 795-96 & n.4.

This passage reveals at least three fundamental errors. First, nothing in Judge Will's memorandum opinion supports the panel's "assumption" that he used "stay" as a synonym for "abate." To the contrary, Judge Will made very clear that Calvert's Rule 10b-5 claim was "a viable claim in [his] court." Calvert's claim has not been overthrown: The federal court has retained jurisdiction, but adjudication has simply been temporarily delayed.

Second, in the above-quoted passage the court below found it "clear" that Judge Will "intended to defer . . . to the results reached in the state proceedings." Again, it is the exact opposite that is clear. Judge Will intended at the time of his May 6, 1975 memorandum opinion, and intends today, to reach his own decision on Calvert's claims, the claim for damages under Rule 10b-5 and the other counts in Calvert's complaint, at the appropriate time, taking into account the then existing situation. Far from automatically deferring to the state court, he will make a determination reviewable in the court of appeals and this Court, of the proper effect to be given to the outcome of the state proceedings. The court below itself correctly stated that the applicability of doctrines such as res judicata and collateral estoppel has not yet been determined and therefore cannot yet be at issue. *See* 560 F.2d at 797.

Third, the court below construed Judge Will's actions to be based "on grounds of federalism." This is not true. Federalism was not at issue in *Landis* v. *North American Co.*, and is not at issue here. Judge Will stayed the proceedings in his court in the interest of judicial economy and efficiency in litigation, not because the issues were more properly presented to a state forum, or because a federal forum would interfere with the development of state policies. Judge Will's decision would have been identical if the cases had been pending in two federal courts.

In sum, Judge Will's decision involved not a denial of federal jurisdiction, but only a matter of timing of the exercise of jurisdiction assumed to exist. He simply postponed decision of the Rule 10b-5 and the other issues before him because of the substantial possibility that the litigation in his court would become entirely moot as a result of the earlier filed parallel litigation between the same parties being conducted in state court. It was this kind of control over their judicial calendars that was confirmed to district judges in *Landis* v. *North American Co.*

Judge Will expressly retained jurisdiction over all of Calvert's claims, and issued only a temporary stay. Calvert has not been denied its right to a federal forum. If at some point Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, or if at the end of state court litigation, Calvert's Rule 10b-5 claim has not become moot, Judge Will would then decide all issues before him in the light of the then existing posture of the state court proceedings.

In the interim, he would be able to devote his efforts to the claims of other litigants who have no alternate state court case through which to seek identical relief.

B. The Court Below Misinterpreted the Holding of *Colorado River*

Although, as explained above, Judge Will did not dismiss Calvert's federal claims, but merely postponed their resolution in the interest of judicial economy, the court below concluded that *Colorado River* effectively overruled *Landis* v. *North American Co.*, taking away from district judges the discretion to order their calendars in the interest of judicial efficiency. In reaching this surprising conclusion, the court of appeals overlooked at least three critical distinctions between *Colorado River* on the one hand, and the situations presented in *Landis*, *Aetna* and the instant proceedings on the other.

1. *Colorado River* Concerned Final Dismissals, Not Mere Stays

First, and most important, *Colorado River* involved the dismissal of a federal lawsuit in deference to state litigation, not the grant of a mere stay. There is no ambiguity in the *Colorado River* opinion on this point; indeed, the Court could not have made itself any clearer. *See, e.g.*, 424 U.S. at 806 ("We granted certiorari to consider the important questions of whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate"); *id.* at 813 ("Next we

consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms"); *id.* at 819 ("Only the clearest of justifications will warrant dismissal"); *id.* at 820 ("We emphasize, however, that we do not overlook the heavy obligation to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if .... But the opposing factors here, particularly the policy underlying the McCarran Amendment, justify the District Court's dismissal in this particular case") (footnote omitted). The dissenting opinion was even more blunt, characterizing the *Colorado River* holding as "clos[ing] the doors of the federal courthouse." *Id.* at 823 (Stewart, J., dissenting).

Whereas the instant case involves merely timing, *Colorado River* involved jurisdiction. *Colorado River's* extended treatment of the abstention doctrine is sharp illustration. The Court was interested in situations where federal courts should keep out of litigation not temporarily, but finally and for all purposes:

> "It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. In *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." 424 U.S. at 814-15.

In such a situation, a mere stay of federal proceedings, with the state adjudication later subjected to scrutiny by the federal judge, could be as disruptive as an immediate federal determination. The holding of *Colorado River* is that in certain cases federal courts should have no jurisdiction to act at all.

The practical distinctions between dismissal of litigation, as discussed in *Colorado River,* and the grant of a stay are highly significant. Dismissal of a federal lawsuit in favor of state litigation, as was permitted by the *Colorado River* Court, may involve serious consequences for the litigants. The federal forum in closing its doors leaves the litigants no recourse if the state proceeding ultimately proves inadequate. No possibility of review in the federal courts of appeals is possible. If Water Division 7 and the Colorado state courts proceeded with unjustifiable slowness or reached results prejudicial to federal claims and defenses, the Indian tribes in *Colorado River* would have no recourse except the possibility of review of the final state court judgment by certiorari in this Court.

This situation is very different, however, when a federal court grants merely a stay. The state litigation remains continually subject on a proper showing to consideration by the federal judge in reviewing his stay order. If it were to appear at any point that Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, the stay could be lifted. And as noted above, if at the end of state court litigation there remained unresolved, unmooted federal claims, Judge Will would then proceed to decide all pending issues.

This jurisdiction by district courts is precisely what litigants are entitled to by the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River, supra,* 424 U.S. at 817. On the other hand, to equate stay orders with final dismissals, and conclude, as did the panel below, that the same standard of "exceptional circumstances" should apply to both, is logically untenable. If "exceptional

circumstances" are present, and therefore the case should properly be dismissed, it would be inappropriate for the court merely to stay proceedings in the interest of "judicial economy."

Moreover, as pointed out above, if the *Colorado River* Court had intended to take away the power of district judges to grant stays except in exceptional circumstances, it would have been necessary to overrule *Landis* v. *North American Co.*, which expressly recognized a broad discretion to stay litigation in the interest of judicial economy. Yet *Landis* was never criticized, much less overruled.

2. *Colorado River* Does Not Support the Grant of Mandamus Relief

The second respect in which the court below misunderstood *Colorado River* is a procedural consequence of the significant differences between a stay and a dismissal of a federal action. The *Colorado River* dismissal came before the appellate court on an appeal, where the correctness of the district court's exercise of discretion was at issue. *See* 424 U.S. at 827 (Stevens, J., dissenting) ("even on the Court's assumption that this case should be decided by balancing the factors weighing for and against federal jurisdiction, I believe we should defer to the judgment of the Court of Appeals"). In the instant case, however, Judge Will's stay order came before the Seventh Circuit on a petition for mandamus, where the only issue was whether or not Judge Will had violated a "clear legal duty" concerning which there is no discretion, *see Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Colorado River* opinion recognized a discretionary authority in district judges to dismiss duplicative litigation in "exceptional circumstances": it was on the basis of a weighing of factors that the Court ultimately upheld the dismissal in *Colorado River*. Accordingly, under *Colorado River*, it is doubtful that the kind of clear legal duty necessary for the grant of mandamus relief would be present.

3. *Colorado River* Was Primarily Concerned With Issues of Federalism

The panel's third misperception of *Colorado River* lies in its failure to note that, despite the Court's recognition of considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," 424 U.S. at 817, most of the analysis in *Colorado River* was devoted to questions of federalism. *Colorado River* did not purport to be a comprehensive analysis of the discretionary power available to district judges to stay litigation in the interest of judicial economy. Rather the issue was the narrow question of whether a particular case over which federal jurisdiction existed, but which seemed to be more properly brought in a state forum, could be dismissed by the federal court.[7] *See, e.g.*, 424 U.S. at 819 ("we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings"). The Court held that, while none of the general abstention doctrines applied to the facts of the case, dismissal was justified by a specific set of "exceptional circumstances," including the McCarran Amendment's recognition of the utility of consolidating water adjudications in state court, the distance of interested parties from the federal courthouse, and the participation by the plaintiff Government in other Colorado state water proceedings.

The *Colorado River* Court emphasized that it intended to set no general precedent. *See* 424 U.S. at 820 & n.26 ("We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if . . ."). The *Colorado River* decision was an express ruling by the Court shifting from the federal court a particular proceeding as necessary to carry out the congressional purpose underlying the McCarran Amendment.

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[7] Indeed, it should be noted that the *Colorado River* Court approved the federal court's deference to the state proceeding even though the federal case had been filed first.

The opinion shows no evidence of any intent to make any change in existing doctrine applicable outside the context of water rights and the McCarran Amendment, and relied heavily on the congressional policy expressed in that Amendment.

The touchstone of the power of district judges to order their calendars in the interest of judicial economy is thus not *Colorado River,* but remains *Landis* v. *North American Co.* Indeed, it should be noted that the discretion confirmed in *Landis* extends far beyond that exercised by Judge Will. In *Landis,* the Court permitted a district judge to stay proceedings pending the outcome of a case between different parties because that case might clarify a question of law. In no event could the stayed litigation have been rendered moot as a result of the other case. Conversely, the litigants in *Landis* had no alternate court, state or federal, in which to have their claims adjudicated. But in the instant situation, the parties and claims before Judge Will and the state judge are to all intents and purposes identical, and the state court has authority to grant all requested relief, thereby creating a strong possibility that the federal case will ultimately be rendered moot.

When the above points are collectively considered, it is clear that *Colorado River* did not overrule *Landis* v. *North American Co.*, and in no way required the Seventh Circuit to overrule *Aetna*. Indeed, as will be demonstrated below, to the extent that *Colorado River* by analogy has implications for the current litigation, it implies that Judge Will acted properly.

III. THE DECISION BELOW IS INCONSISTENT WITH *COLORADO RIVER*

As the dissenting opinions made clear, the effect of *Colorado River* was not to limit the discretion of federal judges, but to extend it. Prior to *Colorado River*, it had seemed clear that with the exception of the narrow abstention doctrines, it was never proper for a federal court to dismiss a case within its jurisdiction because of the pendency of state court proceedings. In sharp contrast to the broad discretion to control their calendars

confirmed to them in *Landis,* district judges had no discretion whatever to dismiss lawsuits properly brought before them. *See* 424 U.S. at 821 (Stewart, J., dissenting):

> "The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree. The Court further says that the McCarran Amendment 'in no way diminished' the District Court's jurisdiction. I agree. The Court also says that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' I agree. And finally, the Court says that nothing in the abstention doctrine 'in any of its forms' justified the District Court's dismissal of the Government's complaint. I agree. These views would seem to lead ineluctably to the conclusion that the District Court was wrong in dismissing the complaint. Yet the Court holds that the order of dismissal was 'appropriate.' "

Colorado River, however, recognized for the first time discretion to dismiss in a limited number of "exceptional circumstances." The Court specified that this newly-created discretion was an extension of the long-standing rule of *Landis* v. *North American Co.*:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, [citation omitted]; the desirability of avoiding piecemeal litigation, [citation omitted]; and the order in which jurisdiction was obtained by the concurrent forums, [citation omitted]. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v.

North American Co., supra, 299 U.S. at 254-255." 424 U.S. at 818-19.

These factors are precisely what Judge Will considered in granting his stay. Therefore, if *Colorado River* suggests anything about the instant case, it suggests that Judge Will's order was correct, but that if he had deemed it appropriate, the far more extreme action of dismissing Calvert's complaint might also have been available to him.

There is one additional factor upon which Judge Will relied in staying Calvert's Rule 10b-5 claim, a factor that may also have influenced the court of appeals' conclusion that Judge Will exercised his discretion "correctly." Because diversity jurisdiction existed, if Calvert had truly desired to have its case litigated in federal court, it could simply have removed American Mutual's declaratory judgment action. Calvert's strategy, however, was to proceed in two courts simultaneously.[8]

The decision below, by encouraging duplicative litigation and denying district judges any power to order their calendars efficiently, is totally inconsistent with *Colorado River*, which expressly extended *Landis* v. *North American Co.* by according district judges additional discretion to cope with wasteful duplicative and piecemeal litigation. Federal claimants are already protected by the retained jurisdiction of federal district courts after granting discretionary stays. The only beneficiaries of the decision below would be those litigants who already have one forum for their defense in the state courts which has not been shown to be inadequate, but who nevertheless have been granted by the Court below the advantage of a second forum.

[8] As noted in our petition there seems to be no interest in pursuing the underlying factual question whether Calvert was or was not misled when it entered the reinsurance pool. On the contrary, the proceedings in the state courts up to the Illinois Supreme Court appear to have concentrated on the issue of whether a security was sold when Calvert joined the reinsurance pool.

Recently, in *General Atomic Co.* v. *Felter*, 98 S. Ct. 76 (1977), this Court reaffirmed summarily that state courts were without power to enjoin "vexatious and harassing" duplicative litigation in federal courts. This Court considered litigants to be protected, however, because "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment." *Id.* at 79. Yet the opinion of the Seventh Circuit in the instant case would deny district courts that capability to control proceedings to prevent harassment and abuse. Indeed, the decision below would increase the likelihood of harassing duplicative litigation by compelling the federal district courts to decide "immediately" issues already being adjudicated in state courts. The obvious consequences to the proper administration of justice are so clearly adverse that reversal is necessary.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, and the writ of mandamus ordered vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF OF AMERICAN MUTUAL REINSURANCE COMPANY, RESPONDENT, IN SUPPORT OF PETITIONER.

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BRIEF OF AMERICAN MUTUAL REINSURANCE COMPANY, RESPONDENT, IN SUPPORT OF PETITIONER.

ARGUMENT.

I.

Reversal of the Order of the Court of Appeals for the Seventh Circuit Issuing the Writ of Mandamus Is Required to Prevent Wasteful, Duplicative Litigation Instituted by Parties Seeking to Indefinitely Delay the Adjudication of Controversies on the Merits.

The record before the Court of Appeals includes the Opinion of the Illinois Appellate Court in the parallel state court ac-

tion instituted by American Mutual Reinsurance Company ("Amreco") against Calvert Fire Insurance Company ("Calvert"). It is impossible to have a complete understanding of this case, or of the ramifications of the order of the Court of Appeals, without some knowledge of the state court action.

This litigation was commenced in July of 1974 when Amreco filed a straightforward contract action against Calvert in the Circuit Court of Cook County, Illinois. Calvert could have removed the case to the United States District Court on the basis of diversity jurisdiction, but did not do so. Amreco in its Complaint alleged that Calvert breached its reinsurance contract to reinsure Amreco. Amreco had a similar contract with 99 other reinsurers. The reinsurance contract in question covered the year 1974, a year in which casualty and fire losses were unusually high.

Calvert was the only one of the 100 reinsurers who had similar contracts with Amreco which attempted to avoid its liability under the reinsurance contract. Calvert has alleged that Amreco made misrepresentations in order to induce Calvert to enter the contract.

Amreco is, and has been for almost four years, prepared to prove that Calvert attempted to rescind its agreement only after Calvert became aware of potential losses under the reinsurance agreement resulting from a disastrous wave of tornados which struck the South and Midwest in early April, 1974.[1]

Amreco has sought an adjudication of the case since its inception but has been subjected to a continuing barrage of dilatory and burdensome procedures. To avoid an adjudication of the basic issues, Calvert has:

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1. "Twisters Put Reinsurers in the Forefront", The National Underwriter, April 12, 1974, at 1, col. 4 ("The reinsurers are going to get murdered"). The telegram from G. E. Roberts, President of Calvert, demanding Amreco to "Terminate our multiline reinsurance agreement retroactive to January 1, 1974" was sent on April 19, 1974.

1. Moved to have Amreco's action dismissed on the ground that declaratory action was not an appropriate remedy for breach of contract.
2. Moved to have the order denying Calvert's Motion to Dismiss certified for an interlocutory appeal, which Motion was denied.
3. Moved to stay discovery in the state court action pending its Motion to Dismiss.
4. Attempted, a second time, to have Amreco's action dismissed or, in the alternative, transferred from the Law Division to the Equity Division.
5. Moved that the Court certify for an interlocutory appeal the question raised by Calvert's second Motion to Dismiss, which Motion to certify was denied.
6. Answered Amreco's Complaint alleging both as a defense and in support of a counterclaim for rescission and damages that Amreco was guilty of common law fraud. Calvert also alleged, as defenses and in support of its counterclaim violations of the Securities Acts premised on the proposition that Calvert's contract to reinsure Amreco constituted the sale of a "security" by Amreco to Calvert.
7. Instituted the instant action in the United States District Court six months after Calvert had been sued in the state court seeking a rescission of its reinsurance contract, or in the alternative, damages based on the foregoing alleged violations of the Securities Acts. The only difference in the allegations made by Calvert in the District Court from those made by Calvert in the Circuit Court of Cook County was the addition of an ancillary claim for money damages under Rule 10b-5.
8. Moved to stay the state court proceedings in the state trial court pending the outcome of the district court action. This motion was denied.

9. Having failed to have the state court actions stayed, sought a change of venue on the grounds that the trial court was prejudiced against Calvert. Calvert's motion, again, was denied.

10. Filed a petition for writ of mandamus in the Supreme Court of Illinois, after the state trial court had issued its decision striking Calvert's defenses and counterclaim based upon the Securities Acts, seeking a writ of mandamus to require the trial court judge to grant Calvert's motion for a change of venue. The motion to file the petition for the writ of mandamus was denied by the Illinois Supreme Court.

11. Sought an interlocutory appeal to the Appellate Court of Illinois, from the order of the trial court striking Calvert's alleged defenses and counterclaims based on federal and state securities laws. The appeal was granted, and the Illinois Appellate Court affirmed the decision of the trial court.

12. Moved for a rehearing in the Appellate Court of Illinois, which rehearing was denied.

13. Moved for a certificate of importance from the Appellate Court to the Illinois Supreme Court.

14. Before the Appellate Court ruled upon the Motion for a certificate of importance, Calvert filed a petition for writ of mandamus requiring the Appellate Court to rule on Calvert's motion for a certificate of importance.

15. Filed a petition for leave to appeal to the Illinois Supreme Court from the judgment of the Appellate Court, which petition was denied.

16. During the time period Calvert was undertaking the foregoing, Calvert filed a petition for writ of mandamus with the Court of Appeals for the Seventh Circuit which is the subject of this Court's consideration.

17. After the granting of the petition for writ of mandamus, Calvert opposed the motion of Amreco to stay the issuance and effect of the writ of mandamus pending the disposition of this case by this court.

Calvert's ingenuity in exploiting all procedural avenues permitted in the state and federal courts is self-evident when it is noted that Calvert has succeeded in bringing one aspect or another of this dispute before the Circuit Court of Cook County, the Appellate Court of Illinois for the First District, the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit and this court.

Almost four years have elapsed since this simple contract action was instituted in the Circuit Court of Cook County and resolution of the dispute is still not within sight.

Calvert has succeeded in these maneuvers by contending that the conventional reinsurance agreement entered into whereby Calvert was to reinsure Amreco constituted the sale of a "security" by Amreco to Calvert and by Calvert's invoking the jurisdiction of both the Illinois courts and the federal courts to adjudicate this claim.

Judge Will perceived this strategy at an early stage and issued an order staying proceedings in the United States District Court pending resolution of the issues raised by Calvert in the state court. Unfortunately, the order of the Seventh Circuit Court of Appeals issuing the writ of mandamus requiring Judge Will to immediately rule on the "security" issue has permitted Calvert to continue its dilatory practices and delay adjudication of this dispute on the merits.

If the order issuing the writ of mandamus is not reversed, Judge Will will be required to adjudicate the "security" issues. Judge Will has stated, as part of the record, that if required to

adjudicate this issue, he would adjudicate it against Calvert, even as the Illinois courts have done.[2]

The only result of the ruling mandated by the Court of Appeals would be an appeal by Calvert from the ruling of Judge Will to the Court of Appeals for the Seventh Circuit and, if the Court of Appeals affirms Judge Will, presumably a petition for a certiorari to this court will be filed.

It is difficult to conceive that such practices should be tolerated, much less condoned.

Absent all questions of *res judicata* and collateral estoppel resulting from the state court determination, there is no valid reason why Calvert, which has placed the federal securities issue before both the state courts and the United States District Court, should be the beneficiary of a writ of mandamus directing Judge Will to immediately adjudicate its "security" issue.

The failure of this Court to reverse the order of the Court of Appeals issuing the writ of mandamus will condone the activities of Calvert in continuing to shop for a forum which will favorably rule on its security issue and, at the very least, delay indefinitely a resolution of this dispute.

It is impossible to believe that this Court intended its decision in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976) to sanction conduct such as Calvert has engaged in. The Court of Appeals apparently did not appreciate the practical consequences of its issuance of the writ.

Moreover, the Court of Appeals issued the writ, predicated upon the assumption that Calvert might have a claim under Rule 10b-5 and the Securities Exchange Act of 1934 against Amreco for money damages which is the only "security" issue raised by Calvert which has not been presented to the Illinois courts. (The Illinois courts have decided that the transaction in

2. Transcript of Proceedings before the Hon. Hubert L. Will on June 18, 1975, at 3, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 102 (N. D. Ill. 1975).

question did not constitute the sale of a "security" under either the 1933 or 1934 acts).

The fallacy underlying the opinion of the Court of Appeals in this respect is that Calvert's claim for money damages is a claim which could never be granted. Calvert has paid nothing to Amreco under its contract of insurance. Money damages could accrue to Calvert only if it were held liable under the contract. If Calvert should prevail in either case it would be granted rescission, and no damages could be assessed. The money damage claim is totally superfluous to Calvert's claim and defenses as was recognized by Judge Will during oral argument.[3]

The history of this litigation demonstrates the ramifications of the Seventh Circuit's application of this Court's decision in *Colorado* to litigation of this type. It is difficult to believe that this Court intended such a reading of *Colorado River* or the Seventh Circuit intended to sanction such to conduct.

Amreco has already been subjected to endless, expensive, dilatory practices. To prevent such abuse in the future, District Court judges must be revested with the authority they formerly possessed to control their dockets. This Court can do so by reversing the decision below and reaffirming *Landis* v. *North American Co.*, 299 U. S. 248 (1936) as suggested by the Petitioner.

II.

Reversal of the Order Granting the Writ of Mandamus Will Rectify the Clearly Erroneous Interpretation Given by the Court of Appeals to the Colorado River Case.

The Court of Appeals for the Seventh Circuit apparently completely misapprehended the holding of this court in *Colorado River* in determining to issue the writ of mandamus requiring an

3. Transcript of Proceedings before the Hon. Hubert L. Will on May 9, 1975, at 50, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, Docket No. 75 C 103 (N. D. Ill. 1975).

immediate adjudication of the issues before the Honorable Hubert L. Will.

Ironically, *Colorado River*, should be read as supporting the action taken by Judge Will. In the *Colorado River* case this Court approved the dismissal of an action commenced in the United States District Court when the same issue was pending in the state court. The Seventh Circuit interpreted *Colorado River* as applying to stay procedures as well as dismissal and determined that only in "exceptional circumstances" should such a stay order be issued, not finding such circumstances in this case.

The *Colorado River* case does not support, much less demand the extraordinary action taken by the Court of Appeals. In *Colorado River*, the cause of action in the district court was dismissed and the aggrieved party was deprived of any remedy in the federal court. This court was understandably cautious in sanctioning such dismissal but did in fact affirm the action of the trial court.

The instant case does not involve a dismissal of a federal claim but merely a stay order. Calvert has not been deprived of a single federal remedy. The adjudication of Calvert's federal remedy has merely been postponed. Judge Will has only determined not to proceed with the ancillary Rule 10b-5 claim while the substantive issues of the federal securities laws were litigated at the instance of Calvert in the court of Illinois where Calvert had placed the subject in issue.

Nor does *Colorado River* support the issuance of the extraordinary writ of mandamus. *Colorado River* speaks to the discretion which federal judges do and should have in dealing with piecemeal litigation in multiple courts. 424 U. S. at 818-819. *Colorado River* grants discretion to district judges to dismiss in instances of multiple litigation. Certainly a district judge should also possess discretion in exercising the less drastic power to postpone an adjudication.

The interpretation given to *Colorado River* by the Court of Appeals is that every district court must grant an "immediate"

adjudication to a party claiming a federal right even while that same party has placed his federal right in issue in another court and has already had two adjudications of the issue.

Reversal of the order issuing the writ of mandamus in the instant case will cure the confusion resulting from the opinion of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is therefore respectfully submitted that the order of the Court of Appeals for the Seventh Circuit issuing the writ of mandamus be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, CALVERT FIRE INSURANCE COMPANY

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IN THE

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and

AMERICAN MUTUAL REINSURANCE COMPANY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, CALVERT FIRE INSURANCE COMPANY

QUESTION PRESENTED

We accept the statement of the facts in the Petitioner's brief,[1] but not its formulation of questions presented. We suggest that the case, on its facts, presents a single, narrow question:

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1. A note should be added with respect to the status of the action in the state court. The trial court dismissed the counterclaim and struck the defenses going to the federal and state securities laws on the grounds (1) that no "security" was involved and (2) that

When a potential defendant in an action under SEC Rule 10b-5, 17 C. F. R. §240.10-5—over which §27 of the Securities Exchange Act of 1934, 15 U. S. C. §78aa, gives the federal courts exclusive jurisdiction—initiates litigation by bringing a state court action for a declaratory judgment as to the validity of the relevant contract, and the defendant in that action brings its own federal court action under Rule 10b-5, and the federal judge precludes federal resolution of the 10b-5 claim by refusing to decide that claim until the conclusion of the state action, is it error for the Court of Appeals to grant a writ of mandamus ordering the judge to exercise his exclusive jurisdiction over the 10b-5 claim?

SUMMARY OF ARGUMENT

(1) Calvert's efforts in both federal and state courts have been devoted to one end: obtaining a federal determination of its claim that American Mutual sold it a "security" in violation of the antifraud provisions of Rule 10b-5 (as well as the registration requirement of the Securities Act of 1933). Except for the possibility of ultimate review of the highest available state court determination by this Court, there is no way to give Calvert the

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application of the federal securities laws was barred by the McCarran-Ferguson Act (15 U. S. C. § 1012(b)). But it considered those questions sufficiently substantial to warrant an interlocutory appeal. App. D. The Illinois Appellate Court affirmed. *American Mutual Reinsurance Co.* v. *Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 367 N. E. 2d 104 (1977). And both that court and the Supreme Court of Illinois declined to permit review by the latter court.

Calvert intends shortly to file a petition in this Court for a writ of certiorari to review the decision of the Illinois Appellate Court, in order to make it possible for this Court, if it is so disposed, to put the "security" question to rest without a decision of that question by the lower federal courts. Meanwhile Calvert has a motion pending before the Supreme Court of Illinois—which American Mutual is resisting—for a stay of its mandate pending this Court's disposition of both the present case and the petition for a writ of certiorari to be filed by Calvert.

federal forum to which it is entitled except mandamus. For, if the federal claims should ever get back to the federal court after a trial in the state court, there may well be nothing left for the federal court to decide except the res judicata or collateral estoppel consequences of the state court's judgment.

(2) In the absence of any of the grounds for "abstention" or any of the considerations of "wise judicial administration" to which this Court referred in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), the District Court had a heavy obligation to proceed—an obligation that attached with respect to Calvert's claims under both Acts, but *a fortiori* with respect to its claim under Rule 10b-5, as to which the District Courts' jurisdiction is by statute exclusive.

(3) The fact that Calvert would be made whole if it successfully defended American Mutual's state action for a declaratory judgment does not reduce the federal court's obligation to exercise its jurisdiction over Calvert's action for rescission. And the very uncertainties and complexities surrounding the impact of the res judicata and collateral estoppel doctrines on a state court's determination of a federal question *by way of defense* (particularly insofar as the federal court's jurisdiction is exclusive) are all the more reason for the federal court to proceed so that those questions will be avoided.

(4) The Petitioner's brief grossly overstates the argument of loss of docket control. A crowded docket cannot justify a refusal to exercise jurisdiction. And any loss of docket control attendant on an affirmance under the circumstances of this case would not be major in any event.

(5) Mandamus is the proper remedy to compel a lower court to exercise its jurisdiction when it has a duty to do so.

(6) Although the district court's order was in form a "stay," it had the effect of a dismissal.

ARGUMENT

I. Under the Circumstances the District Court Had an "Unflagging Obligation" to Exercise Its Exclusive Jurisdiction

First: It has been a basic principle of our federal system for two hundred years, as this Court unanimously emphasized in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813 (1976), that it is "the duty of a District Court to adjudicate a controversy properly before it." See also *McClellan* v. *Carland*, 217 U. S. 268, 281 (1910); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230, 235 (1922). "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U. S. at 813. And none of the "extraordinary and narrow exception[s]" justifying abstention (*ibid.*) is present here. Nor is any of the considerations of "wise judicial administration," discussed in *Colorado River*, that "govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts." 424 U. S. at 817.[2]

Second: What the Court in *Colorado River* called "the heavy obligation to exercise jurisdiction" (424 U. S. at 820) applies *a fortiori* when the federal court's jurisdiction, as under the Securities Exchange Act, is *exclusive*. Apart from the inherent logic of this proposition, *Cotler* v. *Inter-County Orthopaedic Ass'n, P. A.*, 526 F. 2d 537, 542 (3d Cir. 1975), it is implicit in the *Colorado River* statement, apropos of the Court's discussion of "wise judicial administration," that "We need not decide * * * whether * * * dismissal would be warranted * * * if the state

2. American Mutual, of course, brought its declaratory judgment action first. But Calvert's counterclaim and its federal action were filed on the same day. And so far as "the desirability of avoiding piecemeal litigation" is concerned (424 U. S. at 818), the District Court's characterization of the scope of the state court action as "broader" (Pet. for Cert. at B-5) is puzzling even if Calvert's claim for *damages* under Rule 10b-5 is treated as surplusage.

proceeding were in some respect inadequate to resolve the federal claims." 424 U. S. at 820.

Third: To be sure, the federal court's jurisdiction to entertain *actions* under Rule 10b-5 does not prevent a state court from considering a 10b-5 *defense* to an action on the contract (or for a declaratory judgment as in the case at Bar). See *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259 (1897) (defense alleging invalidity of patent that was basis of action in assumpsit); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87-88 (1902) (defense of illegality under antitrust laws). But that result is required by the Supremacy Clause. For otherwise the plaintiff might get his judgment "in spite of the defense available to the defendant under the federal portion of the whole congeries of federal and state law applicable to the transaction." 2 Loss, *Securities Regulation* 979 (2d ed. 1961).

The fact that a state court's jurisdiction (indeed, its duty) to decide federal questions by way of *defense* is sometimes greater than its jurisdiction to decide federal question *claims* is, in a sense, an inherent imperfection of our federal system. But, when the state court defendant seeks out the federal forum that Congress clothed with exclusive jurisdiction over the federal claim, the federal court should not go out of its way to defer to a state court on federal issues just because the potential federal court defendant gets to the state courthouse with an action for a declaratory judgment (or it might be for breach of contract) before the state court defendant files his 10b-5 claim in a federal court.

Fourth: As we have suggested in our statement of the question presented, all that the Court needs to decide is that the District Court's "virtually unflagging obligation * * * to exercise [its] jurisdiction" (*Colorado River*, 424 U. S. at 817) allows it no discretion when a state court defendant invokes the *exclusive* jurisdiction of the federal court over a 10b-5 action. But Calvert claims also that American Mutual violated the registration requirement of §5 of the Securities Act of 1933 (15 U. S. C.

§77e). And, even though §22(a) of the 1933 Act (15 U. S. C. §77v(a)) gives the federal and state courts concurrent jurisdiction, we submit that the District Court's obligation to exercise its concurrent jurisdiction—as in the *Colorado River* case itself (subject to the exceptions there considered)—is no less "unflagging" than its obligation to exercise the exclusive jurisdiction given it in the 1934 Act.

Fifth: Whether federal jurisdiction is exclusive or concurrent, the fact that federal judges are considerably more experienced with respect to the construction of the federal securities statutes points to additional reasons of policy for their not going out of their way to defer to state courts:

(1) Just as the federal courts have been cautioned by this Court to limit the exercise of their pendent jurisdiction so as to procure for the parties "a surer-footed reading of applicable [state] law" by state courts, *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715, 726 (1966), similarly a "surer-footed reading" of the applicable *federal* law of securities regulation will be rendered by federal courts.[3]

In this very case—notwithstanding (a) the broad reading given the definition of "security" by this Court in no fewer than six cases,[4] (b) the literally scores of cases in the lower federal courts, as well as the state courts under the blue sky laws, that have construed that term in a tremendous variety of contexts, (c)

3. There is nothing in the majority opinion in *Colorado River* that is inconsistent with Mr. Justice Stewart's observation in his dissenting opinion: "A federal court is more likely than a state court to be familiar with federal water law and to have had experience in interpreting the relevant federal statutes, regulations, and Indian treaties." 424 U. S. at 825-26.

4. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946); *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65 (1959); *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967); *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975). The Court has recently granted certiorari in a seventh case. *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753.

the agreement of Calvert and American Mutual that the case at Bar is one of first impression, and (d) the state trial judge's certifying his order for interlocutory review under Illinois Supreme Court Rule 308 (Ill. Rev. Stat. 1975, c. 110A, §308) as involving "questions of law as to which there is substantial grounds [*sic*] for difference of opinion" (App. D)—his entire opinion (dictated from the bench) on the "security" question read (App. A):

> Based on my opinion [*sic:* examination?] of the record, the briefs, the transcript and the arguments, it appears that the principal test, which is applied by the upper courts in the resolving of this very thorny issue, is whether or not—Strike that. Is a consideration of the nature of the transaction and the capacity of the parties dealing therein.
>
> Accordingly, I further find, again, unfortunately at the risk of oversimplification, that the issue is simply this, whether or not the right to participate in the profits and to share the losses of this organization constitutes a security interest within the meaning of the applicable State and Federal Statutes. I specifically find that it does not. That is my ruling.[5]

(2) If the basic "security" question—which is common to Calvert's claims under §5 of the 1933 Act and §10(b) of the 1934 Act—is decided by a federal court, it will, of course, be reviewable in a federal appellate court. To the extent, on the other hand, that the meaning of the critical term "security" in these federal statutes is decided in the state courts, the unifying task of this Court would be greatly enlarged; for the Court might well feel itself under pressure, as the first federal court on the scene, to use its certiorari procedure to review the decisions of state appellate courts more often than it would feel the need to review decisions of the United States Courts of Appeals.

Sixth: The "exclusive jurisdiction" of §27 applies to *"all* suits in equity and actions at law brought to enforce any liability

5. The orders added, as a conclusion of law, that Calvert "was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts." Pp. B-3, C-2 *infra*.

or duty created by this [Act] or the rules and regulations thereunder" (italics supplied). That language manifestly extends to actions for rescission as well as damages. Indeed, the complexities of securities litigation have inevitably caused a blurring between the two forms of relief under Rule 10b-5 through the granting in appropriate circumstances of "rescissional damages."[6] Hence it is of no consequence that Calvert, since it has not yet laid out any money under the contract, would be made just as whole (it may be assumed *arguendo*) if it were successfully to defend the state court action as if it were to get a federal judgment of rescission. That is to say, even if the federal prayer for damages is considered surplusage, Calvert still should not be deprived of a federal forum for its rescission action.

Seventh: We agree with the statement of the Court of Appeals, at the end of its opinion (Pet. for Cert. at A-10, 560 F. 2d at 797), that there is no need now to decide whether the conclusion of the state court proceedings would have either a res judicata or a collateral estoppel effect on the 10b-5 claim in the federal court. Nevertheless, the "brooding omnipresence" of those questions bespeaks an affirmance of the mandamus order. For:

(1) The very possibility that res judicata or collateral estoppel might be held *not* to apply in a case like this—as we shall argue if the occasion arises—was reason in itself for the federal court not to stay its hand while the possibly wasteful state court proceedings ground on.

(2) Conversely, the possibility that state court decisions *might* be given res judicata or collateral estoppel effect so as to bar the federal court's exercise of its exclusive jurisdiction over

6. See *Myzel* v. *Fields*, 386 F. 2d 718, 740-41 (8th Cir. 1967), *cert. denied*, 390 U. S. 951 (1968); *Young* v. *Taylor*, 466 F. 2d 1329, 1336 (10th Cir. 1972); *Arber* v. *Essex Wire Corp.*, 490 F. 2d 414, 422-23 (6th Cir. 1974), *cert. denied*, 419 U. S. 830 (1974); *Blackie* v. *Barrack*, 524 F. 2d 891, 909 (9th Cir. 1975), *cert. denied*, 429 U. S. 816 (1976); see also *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167, 1173 (2d Cir. 1971).

the 10b-5 action—*as American Mutual is certain to argue*—speaks even more forcefully for affirmance here.

The federal-state situation here with regard to matters uniquely federal is more than a little reminiscent of the law-equity situation in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). There the prospective defendant in an antitrust action sued the prospective plaintiff for a declaratory judgment in a federal court. The defendant in that action (the antitrust claimant) filed a counterclaim and demanded a jury trial. The District Court ruled that it would first adjudicate in equity, without a jury, the issues common to the complaint and the counterclaim. And this Court held that the Court of Appeals should have issued a writ of mandamus to protect the counterclaimant's right to a jury trial. For the judge's determination of the question of competition between the two theatres that were involved might operate, as the majority opinion in this Court stated, "either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." 359 U. S. at 504, quoting from the opinion of the Court of Appeals, 252 F. 2d at 874.

Substitute "exclusive federal jurisdiction" for "right to trial by jury," and "state court" for "federal court sitting in equity," and *Beacon Theatres* argues powerfully for the federal court's being required to proceed here precisely to avoid the possibility that the exclusive jurisdiction of the federal courts might succumb to a state court determination.

(3) Whether res judicata and collateral estoppel do or do not apply, one thing is certain: As stated in the strikingly similar case of *Cotler* v. *Inter-County Orthopaedic Ass'n, P. A.*, 526 F. 2d 537, 542 (3d Cir. 1975), "Litigation over the judgment preclusion effects of the state court decision in such a context probably will be as complex as if the federal court had gone ahead with the entire case."

Eighth: It can be no answer to all this that Calvert counsel's research did not reveal the possibility of a "security" question

until it was too late to remove the state court action on the basis of diversity of citizenship:

(1) Nothing in the law *requires* removal.

(2) It has not been suggested that Calvert's federal action was barred by any period of limitations.

(3) Once it invoked the jurisdiction of the federal court, Calvert did everything possible both to persuade the state court to defer to the federal court and to persuade the federal court *not* to defer to the state court.[7] (That is all that the litany at pages 3-5 of American Mutual's brief demonstrates.)

(4) A failure to remove can hardly affect the exclusivity of the federal courts' jurisdiction under the 1934 Act.

(5) In the last analysis, the diversity of citizenship here was fortuitous. In its absence Calvert, of course, could not have removed on the basis of a federal question raised in its answer.

II. The District Court's "Unflagging Obligation" to Exercise Its Jurisdiction Is Not Excused by the Minimal Loss of "Docket Control" That May Result.

Quite apart from the fact that the Petitioner did not act out of the "crowded docket" considerations that his counsel now advance, their attempt to make a fortress out of the volume of business in the federal courts grossly overstates the argument of loss of docket control.

7. Calvert moved the state court for a stay on March 10, 1975 (Brief in Opp. to Cert. at A-3). At that point the federal court had already received briefs on the "security" point (*id.* at B-5, ¶ 8) and the state court had not even established a briefing schedule (*id.* at B-6, ¶ 12). Having failed in that attempt, Calvert asked the federal court to enjoin American Mutual from proceeding on the state side (*id.* at B-3). This, too, was unsuccessful, as were two attempts to persuade the federal court to reconsider its "stay" order as well as an attempt to seek interlocutory review of the "security" question under 28 U. S. C. § 1292(b). Having thus exhausted all other efforts to have the question decided in a federal forum, Calvert at long last succeeded (subject to this Court's disposition) via the mandamus route.

First: A crowded docket can no more justify the District Court's refusal to exercise its jurisdiction here than it did in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976), where the Court stated (at 344) that "an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason."

Second: Any loss of docket control attendant on an affirmance here could not be major in any event:

(1) First of all, *Colorado River* laid down no absolute rule. In that very case the Court concluded that deference to the state court was justified. And here the Court of Appeals did consider "whether the exceptional circumstances which *Colorado River* requires in order to justify federal deference to state proceedings are present." 560 F. 2d at 796, Pet. for Cert. at A-7. It simply found none.[8]

(2) There is no loss of control over docket in the sense that a District Court would have to move a case of this sort to the head of the list. Presumably the reason that the Court of Appeals ordered the Petitioner "to proceed immediately" was the length of time that the case had been pending.

(3) This case, if affirmed, will be a precedent only in the narrow circumstances where (a) the federal plaintiff is defendant in a state court and (b) the federal court (if this Court chooses so to limit its opinion) has exclusive jurisdiction. So far as the first factor is concerned, perhaps the Petitioner's counsel have abandoned the prediction in their petition for a writ of certiorari (p. 15) that "Litigants throughout the United States will file suits simultaneously or successively in state and federal courts, and will cite *Colorado River* and the decision below as entitling them to two trials." The point is not reflected in the Petitioner's brief, presumably because, altogether apart from the state courts' lack of jurisdiction over actions under the 1934

8. See note 2 *supra*.

Act, the courts could readily deal (whether by resort to estoppel techniques or otherwise) with the plaintiff who files concurrent state and federal actions in an attempt to get two days in court.

Certainly Calvert is not in the category of such a plaintiff by virtue of its position as defendant and involuntary counterclaimant in the state court. It could not, of course, risk a default judgment. And in view of the uncertainties of the evolving doctrines of res judicata and collateral estoppel—as well as what has been called the "common-law compusory counterclaim rule," *Restatement (Second) of Judgments,* Tentative Draft No. 1, p. 75, Reporter's Note to §56.1(2)(b)—the only prudent thing for Calvert to do was to add a counterclaim to its answer (while being careful to plead Rule 10b-5 only by way of *defense*).

Third: The Court in *Colorado River* saw nothing inconsistent with the teaching of *Landis* v. *North American Co.*, 299 U. S. 248 (1936). For it cited that case in support of the "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions * * *." *"As between federal district courts,"* the Court said, "though no precise rule has evolved, the general principle is to avoid duplicative litigation." 424 U. S. at 817 (italics supplied).

Nothing in either *Colorado River* or the decision under review negates the general proposition of *Landis* that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket * * *." 299 U. S. at 254. The short of it is that in the federal-state context, which was not involved in *Landis,* and with the roles of the parties reversed in the two courts, the relatively minor impact that *Colorado River* and the present case (if affirmed) may have on docket control must yield to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U. S. at 817.

Whether or not it be true, as the Petitioner's brief claims (p. 16), that the Petitioner acted as he did "in the interest of judicial economy and efficiency in litigation" rather than "on grounds of federalism," the *effect* of his action is what matters. For there is no gainsaying that docket control is a matter of "judicial administration" (*Colorado River,* 424 U. S. at 817); and it does not denigrate the importance of wise *judicial administration* to suggest that that desideratum must be subservient, under our federal structure, to considerations of protecting the *jurisdiction* of the federal courts (especially when that jurisdiction is exclusive).

III. Mandamus Is the Proper Remedy to Compel a Lower Court to Exercise Its Jurisdiction When It Has a Duty to Do So

First: It is beyond argument that mandamus is an extraordinary remedy. But it is equally well settled that a "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 352 (1976), and cases cited.

Second: The Court of Appeals correctly held, we submit, that the Petitioner's order was not appealable without the §1292(b) certificate that the Petitioner would not grant. Pet. for Cert. at A-4, 560 F. 2d at 794. But it would be fruitless to debate that question, notwithstanding its having been raised by the four judges who favored rehearing en banc. 560 F. 2d at 796, n. 5, Pet. for Cert. at A-8. For (1) any distinction between the "clear legal duty" test of mandamus and the "abuse of discretion" test that would govern an appeal approaches the semantic, and (2) we have demonstrated, in any event, that the District Court's failure to recognize its "virtually unflagging obligation" to exercise jurisdiction satisfied either test.

IV. It Is Not Determinative That the District Court's Order Was in Form a "Stay" Rather Than a Dismissal

It is no answer to any of our arguments that *as a matter of form* the District Court, in granting American Mutual's motion to "abate," stated that it was "staying" all but the 10b-5 damages claim[9]—language that the Court of Appeals assumed was meant as a synonym for "abate" (560 F. 2d at 795, n. 4, Pet. for Cert. at A-7)—without using "dismissal" terminology.

First: Whether the District Court meant to say "stay" or "abate," the Court of Appeals correctly concluded that "the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case." 560 F. 2d at 796, Pet. for Cert. at A-7. To hold otherwise, as long as there was any substantial possibility that the federal complaint would ultimately be dismissed by reason of the res judicata or collateral estoppel effect of the state court judgment, would be sticking in the bark of words.

This is not like *Pullman*-type abstention,[10] where it is expressly contemplated that the case may return to federal court for resolution of the federal issues after the state questions have been decided. Any return to federal court here after the state court action is over can be only for the purpose of disposing of the federal action on principles of res judicata or collateral estoppel. The Petitioner's brief (at p. 17) seems to agree when it states that, "if at the end of state court litigation, Calvert's Rule 10b-5 claim has not become moot [a euphemism for "barred by res judicata or collateral estoppel"], Judge Will would then decide all issues before him in the light of the then existing

9. The court left "Calvert's very limited claim for monetary damages under [Rule 10b-5] as a viable claim in this court." Pet. for Cert. at B-9. But it has refused to try any part of the case.

10. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).

posture of the state court proceedings." Indeed, the Petitioner stated to Calvert's counsel on the record (App. E):

> * * * the only issue I had was whether or not this was a security under the '34 act.
>
> Somewhat to my surprise, Judge Dunne has decided that question in the State case, which is [has] the same parties and the same subject matter; therefore, I think that is res judicata and I think it is binding on you and it is binding on me.

Second: The very cases on which *Colorado River* principally relied in talking about deference to another tribunal in the interest of wise judicial administration were cases in which federal action had been stayed, not dismissed. *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Landis* v. *North American Co.*, 299 U. S. 248 (1936); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952). And, with the Court using language like the "virtually unflagging obligation" of the federal courts to exercise their jurisdiction—a "heavy obligation" that may be disregarded only in "exceptional" circumstances (424 U. S. at 817-18, 820)—it is beyond conceit that a District Court, however well intentioned, can escape so weighty a duty by giving the label of "stay" to what will be in effect a dismissal.

CONCLUSION

The Petitioner's brief paints a picture of Calvert as trying every possible device to get two bites at the apple. American Mutual's brief, to boot, accuses Calvert of dilatory tactics (without explaining how delay in Calvert's obtaining the relief to which it thinks itself entitled would be in its interest). We say, contrariwise, that all Calvert's efforts have been devoted to the single end of getting a federal court determination of a basic question (the presence of a "security") over which the federal courts have exclusive jurisdiction under the 1934 Act and concurrent jurisdiction under the 1933 Act.

If this Court is amenable to providing a federal answer to that question by granting the petition that Calvert intends to file for a writ of certiorari to review the judgment of the Illinois Appellate Court (see note 1 *supra*), we would be more than content. Otherwise (subject to the possibility of a later review by certiorari after a complete trial and a series of appeals in the state court system, all of which would raise problems of *res judicata* and collateral estoppel) there is no way to give Calvert the federal determination to which it is entitled without affirming the order granting a writ of mandamus.

The order granting the writ of mandamus should be affirmed.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE CO.,
Plaintiff,

vs.

CALVERT FIRE INSURANCE CO.,
Defendant.

No. 74 L 10737

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable Arthur L. Dunne, one of the Judges of said Court on the 6th day of June A. D., 1975.

Present:

Mr. Thomas J. Weithers, Mr. Thomas M. Hamilton, appeared on behalf of the Plaintiff;

Mr. Michael Weissman, Mr. Don Shapiro, appeared on behalf of the Defendant.

* * * * *

(pp. 63-64)

Based upon my opinion of the record, the briefs, the transcript and the arguments, it appears that the principal test, which is applied by the upper courts in the resolving of this very thorny issue, is whether or not—Strike that. Is a consideration of the nature of the transaction and the capacity of the parties dealing therein.

Accordingly, I further find, again, unfortunately at the risk of oversimplification, that the issue is simply this, whether or not the right to participate in the profits and to share the losses of this organization constitutes a security interest within the meaning of the applicable State and Federal statutes. I specifically find that it does not. That is my ruling.

* * * * *

APPENDIX B

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc., *Plaintiff,* *vs.* CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

ORDER STRIKING FIRST, SECOND, THIRD, FOURTH AND SIXTH AFFIRMATIVE DEFENSES

THIS CAUSE COMING TO BE HEARD on motion of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, for leave of court to file its motion to strike the First, Second, Third, Fourth and Sixth Affirmative Defenses of the defendant, and further, for leave of court to file its reply to the Fifth and Seventh Affirmative Defenses of the defendant's answer and further, for a hearing thereon, instanter, the court having read the briefs of parties with regard to the issues raised in defendant's Affirmative Defenses and, heard on arguments of counsel with regard to those issues on June 6, 1975, due notice having been given and the court being fully advised in the premises:

IT IS HEREBY ORDERED that leave be and the same is hereby granted the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, to file its motion to strike the First, Second, Third,

Fourth and Sixth Affirmative Defenses of the defendant, CALVERT FIRE INSURANCE COMPANY, and its reply to the Fifth and Seventh Affirmative Defenses instanter.

This court makes the following findings of fact with regard to the agreement entered into by the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY, on January 11, 1974.

1. That the said agreement does not constitute a "security" as that term has been defined by § 1(1) of the Securities Act of 1933.
2. That plaintiff's business of obtaining reinsurance contracts constitutes the carrying on of the "business of insurance".
3. That AMERICAN MUTUAL REINSURANCE COMPANY's contract does not constitute a "security" as defined by § 137-2.1 of Illinois Securities Law of 1933 as amended (the "Illinois Securities Law"), Illinois Revised Statutes § 121½ and 137½ and Rule 130 promulgated thereunder.
4. That AMERICAN MUTUAL REINSURANCE COMPANY's contract does not constitute a "security" as defined in § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act") Maryland Code Annotated Acts 32(a) § 26(a)(5)
5. That plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, properly brings this cause of action as a declaratory judgment action in this court.

Pursuant to the above findings of fact, this court makes the following conclusions of law with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY on January 11, 1974:

1. The McCarren-Ferguson Act, 15 U.S.C.A. § 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a state.

2. That CALVERT FIRE INSURANCE COMPANY was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts.
3. That the American Mutual Reinsurance Company's contract with Calvert is exempt from registration under § 3(a)(8) of the Securities Act of 1933.
4. That the McCarren-Ferguson Act, 15 U.S.C.A. § 1101-1105, precludes the application of the Securities Exchange Act of 1934 to the said agreement between the parties.
5. AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953 as amended ("Illinois Securities Law") Illinois Revised Statute, Chap. 121½ § 137-2.1 and Rule 130 promulgated thereunder.
6. That the AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute a "security" as defined by § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act"), Maryland Code Annotated Act 32A § 26(a)(5).
7. That the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, properly brings this action as a declaratory judgment action.

Pursuant to the above findings of fact and conclusions of law, it is hereby ordered that the First, Second, Third, Fourth and Sixth Affirmative Defenses of the defendant, Calvert Fire Insurance Company, be and the same are hereby stricken.

Enter ARTHUR L. DUNNE

Judge

June 16, 1975

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Attorneys for Plaintiff
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APPENDIX C

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc.,
Plaintiff,

vs.

CALVERT FIRE INSURANCE COMPANY,
Defendant.

No. 74 L 10737

ORDER DISMISSING COUNTS I, II AND III OF DEFENDANT'S COUNTERCLAIM

THIS CAUSE COMING to be heard on motion of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, for entry of an order dismissing Counts I, II and III of the counterclaim filed herein by Calvert Fire Insurance Company, pursuant to the hearing before this court on June 6, 1975, the court having reviewed the briefs filed herein by the respective parties, and having heard arguments of counsel, due notice having been given, and the court being fully advised in the premises and the court having ordered on June 6, 1975 the said counts of the defendant's counterclaim were dismissed;

THIS COURT MAKES THE FOLLOWING FINDINGS OF FACT with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY, on January 11, 1974:

1. That the said agreement does not constitute a "security" under the Securities Act of 1933.
2. That the said agreement does not constitute a "security" under the Securities Exchange Act of 1934.
3. That the said agreement does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended ("Illinois Securities Law") Illinois Revised Statute Chap. 121½ §137-2.1 and Rule 130 promulgated thereunder.
4. That the said agreement does not constitute a "security" as defined by 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act") Maryland Code Annotated Act 32A § 26(a)(5).

THIS COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY and the defendant, CALVERT FIRE INSURANCE COMPANY on January 11, 1974.

1. That the said agreement does not constitute a "security" under the Securities Act of 1933.
2. That the said agreement does not constitute a "security" under the Securities Act of 1934.
3. The McCarren-Ferguson Act, 15 U. S. C. A. §§ 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a state.
4. That CALVERT FIRE INSURANCE COMPANY was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts.
5. That American Mutual Reinsurance Company's contract is exempt from registration under § 3(a)(8) of the Securities Act of 1933.
6. AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953 as amended ("Illinois Securities Law") Illinois Revised Statute, Chap. 121½ § 137-2.1 and Rule 130 promulgated thereunder.

7. That the American Mutual Reinsurance Company's reinsurance contract does not constitute a "security" as defined by § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act"), Maryland Code Annotated Act 32A § 26(a)(5).

PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, this court orders that Counts I, II and III of the defendant's Counterclaim be and the same are hereby dismissed.

ENTER ARTHUR L. DUNNE

Judge

June 16, 1975

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APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, *Plaintiff,* vs. CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

ORDER CERTIFYING QUESTIONS OF LAW FOR INTERLOCUTORY APPEAL

This cause coming on to be heard on the motions of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, to dismiss Counts I, II and III of the Counterclaim and to strike the First, Second, Third and Fourth Affirmative Defenses in the Answer of defendant, CALVERT FIRE INSURANCE COMPANY; the Court having reviewed the briefs filed herein by the respective parties, and having heard arguments of counsel, due notice having been given, and the Court being fully advised in the premises;

THE COURT HAVING ORDERED, that plaintiff's motion to dismiss Counts I, II and III of defendant's Counterclaim be granted; and

THE COURT HAVING FURTHER ORDERED, that plaintiff's motion to strike the First, Second, Third and Fourth Affirmative Defenses in defendant's Answer be granted;

The Court finds, under Rule 308 of the Rules of the Supreme Court of Illinois, that its ruling on Counts I, II and III of

defendant's Counterclaim and on the said First, Second, Third and Fourth Affirmative Defenses in defendant's Answer and the orders entered on June 16, 1975 involve questions of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation; and

The Court finds that the questions of law involved in the entry of this order are:

1. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Securities Act of 1933, 15 U.S.C. 77(b)(1)?"
2. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Securities Exchange Act of 1934, 15 U.S.C. 78c.(10)?"
3. "Does the McCarran-Ferguson Act, 15 U.S.C. 1101 et seq., preclude the application of the Securities Act of 1933 to the 'business of insurance' if that business is subject to state regulation?"
4. "When defendant, CALVERT FIRE INSURANCE COMPANY, entered into the Agreement which is annexed hereto as Exhibit 'A', did it simply sell reinsurance to plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, or did it also purchase a security from plaintiff?"
5. "Assuming that defendant, CALVERT FIRE INSURANCE COMPANY, purchased a security from plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, was such security exempted from registration under Section 3(a)(8) of the Securities Act of 1933?"
6. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Illinois Securities Act of 1953, Chapter 121½ Ill. Rev. Stat. 137-2.1 and Rule 130 promulgated thereunder?"

7. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Maryland Securities Act, 32A Md. Code Anno. 25(1)(5)?"

IT IS FURTHER ORDERED, that all proceedings in this Court shall be stayed pending final disposition of an application for leave to file an interlocutory appeal in the Illinois Appellate Court.

Dated: June 17, 1975.

ENTER:

ARTHUR L. DUNNE
Judge

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE CO.,
Plaintiff.

vs.

AMERICAN MUTUAL REINSURANCE CO.,
Defendant.

No. 75 C 103

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Hubert L. Will, one of the Judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 24, 1975, at 10:00 o'clock a.m.

Present:

Mr. Michael L. Weissman, appeared on behalf of the plaintiff;

Mr. Lawrence R. Moelmann, appeared on behalf of the defendant.

* * * * *

(pp. 4-5)

The Court: I am going to look at it, Mr. Weissman, but the only issue I had was whether or not this was a security under the '34 act.

Somewhat to my surprise, Judge Dunne has decided that question in the State case, which is the same parties and the same subject matter; therefore, I think that is res judicata and I think it is binding on you and it is binding on me.

* * * * *

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,
Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977)	9
OTHER AUTHORITIES:	
Securities Act of 1933 §12(1), 15 U.S.C. §77*l*(1)	9
Securities Exchange Act of 1934 §27, 15 U.S.C. §78aa	8
SEC Rule 10b-5, 17 C.F.R. §240.10b-5	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL, Judge,
United States District Court
for the Northern District of Illinois,
Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONER

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1. Introduction

Respondent Calvert's brief is apparently predicated on the assumption that Calvert is the true plaintiff in the underlying

controversy between it and American Mutual Reinsurance Company and that the latter initiated the state court action when it was "a potential defendant in an action under SEC Rule 10b-5 . . . ." Calvert Brief at 2. Accordingly, it implies that the federal court action before Judge Will is the basic suit between the parties.

As even a brief examination of the facts will reveal, Calvert's federal court action is simply a defensive measure to American Mutual's state court suit.[1] While we regret the necessity for doing so, in light of Calvert's brief, we believe it essential to restate briefly the history of the underlying controversy and the situation which Judge Will faced at the time he determined to stay action in his court.

Calvert, as of January 1, 1974, joined ninety-nine other insurance companies in a reinsurance pool. The pool agreement provided basically that without any cash investment on the part of any member, all would share in the pool's profits or losses for the year 1974. In April of that year, Calvert announced that it no longer considered itself bound and purported to rescind its membership *ab initio* because it had been misled as to the 1973 earnings of the pool. (*See* letter of April 22, 1974, Exhibit B to the state court complaint—not previously printed but attached hereto as an Appendix).[2]

The members of the pool rejected Calvert's allegations and asserted that Calvert was bound for its share of any losses. On

[1] If American Mutual had not brought its state court action, but had simply acquiesced in Calvert's announced withdrawal from the reinsurance pool, Calvert could not have filed an action under Rule 10b-5 for money damages since it had invested nothing and would have suffered no actual or potential damage.

[2] American Mutual's brief in support of the petition for certiorari asserts at page 2 that Calvert's attempted rescission resulted solely from the fact that a wave of tornados in the Middle West in early April had assured that the pool would have substantial losses in 1974.

July 3, 1974, the ninety-nine pool members sued Calvert in the state court for a declaration that Calvert was so bound.[3]

About six months later, on January 10, 1975, after some preliminary motions, but *not* one to remove the action to the federal court, Calvert filed an answer and counterclaim in the state court action. The answer defended on the grounds that Calvert had been induced to enter the pool by material misrepresentations of fact, thus rendering the agreement void *ab initio,* and it pleaded also as affirmative defenses that:

1. the contract involved the sale of a security without registration in violation of section 5 of the Securities Act of 1933;

2. the sale of that security was made by fraudulent practices in violation of Rule 10b-5 under section 10(b) of the Securities Exchange Act of 1934;

3. the securities were sold by false statements in violation of the Illinois Securities Law;

4. the securities were sold by false statements in violation of the Maryland Securities Act;

5. Calvert was induced to enter into the agreement by material misrepresentations of fact;

6. plaintiff American Mutual had no authority to sue on behalf of the members of the pool; and

7. the pool was illegal since it had not obtained the approval of the Illinois Department of Insurance.

Calvert's accompanying counterclaim contained counts under section 12(1) of the federal Securities Act of 1933 for failure to register, under the Illinois Securities Law for false statements, under the Maryland Securities Act for false statements, and a general claim of material misrepresentations. The

[3] Since the reinsurance pool agreement was to continue through the year 1974, Calvert had allegedly committed an anticipatory breach, and any damages for that breach could not be calculated until year end, the suit appropriately took the form of a declaratory judgment action.

first two counts of the counterclaim claimed rescission of the agreement, and the second two counts each requested $2,000,000 in damages.

On the same day, Calvert filed its action in the federal district court before Judge Will alleging in Count I that it had been induced to enter into the pool agreement by false statements and that it had been sold a security in violation of section 5 of the Securities Act of 1933; and in Count II that the sale was in violation of Rule 10b-5 under the Securities Exchange Act of 1934. Count II asked for rescission or, in the alternative, damages in the amount of $2,000,000. Counts III and IV alleged false statements in violation of the Illinois and Maryland securities laws respectively, and Count V alleged that Calvert was induced to enter into the agreement on the basis of materially misleading representations concerning the financial experience of the pool for the year 1973.

As is apparent, Calvert's defenses in the state court proceedings and its claims in the federal case were and are identical except for the alternative relief for money damages under the Rule 10b-5 claim asserted in the federal court, although the total amount of monetary damages sought in both actions, $2,000,000, is also identical. The principal issue in both cases appeared to be whether or not Calvert had in fact been misled when it was induced to enter into the agreement in January 1974. This was an issue which had been pending before the state court since July 1974. Plainly, the two lawsuits, state and federal, involved the same parties and substantially identical issues.

Accordingly, in May 1975, on motion of the pool Judge Will stayed the proceedings in his court and stated:

> "Regardless of its litigating posture in these two cases, Calvert is responsible for raising substantially the same claims in both courts. As would be the case if this were repetitive litigation, the same elements of duplication of effort and extra burden to the courts

> are present. As Professor Vestal concluded in his scholarly work dealing with reactive litigation, the press of litigation facing the courts highlights the need to curtail or eliminate unnecessary reactive litigation, not only to conserve judicial manpower but also to avoid the unseemly race to judgment with its concomitant harrassment and confusion. Vestal, *Reactive Litigation,* 47 Iowa L. Rev. 11 at 28 (1961). Accepting reactive litigation as merely another form of duplicative litigation imposing similar burdens upon the courts and litigants, we find the positioning of Calvert as defendant-counterclaimant in the state suit and plaintiff here to be of little consequence, and not to preclude our exercise of discretion permitting the state court to adjudicate the 1934 Act defense.
>
> "Nor are we persuaded by Calvert's suggestion that we should assume jurisdiction because the paramount issues are federal in nature. While we agree that, all things being equal, federal courts are the preferred forum for considering securities questions arising under federal law, the Seventh Circuit in *Aetna* [*State Bank* v. *Altheimer,* 430 F.2d 750 (7th Cir. 1970),] stressed a corresponding need for judicial economy. Since this is a question of discretion and not jurisdiction, we find, as in *Aetna,* that confining all of the issues before the state court is preferable to simultaneous consideration by both courts of all issues, both state and federal.
>
> * * *
>
> "While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and

counterclaim in the state court and raise the same issues here." *Calvert Fire Insurance Co.* v. *American Mutual Reinsurance Corp.*, No. 75 C 103, slip op. at 9-10 (N.D. Ill. May 6, 1975).

It cannot be denied that Judge Will was faced with a situation where it would have been wasteful and duplicative for him to consider and decide the same issues that were already pending in the state court. Simple common sense and principles of avoidance of duplicative, expensive, and wasteful litigation indicated the desirability, indeed, the necessity, of staying his hand to see whether the state court would dispose of the factual and legal issues without duplicative effort on his part. He preserved his own jurisdiction against the possibility that the expected outcome of a final and conclusive decision by the state courts should not eventuate, and a lifting of his stay might be appropriate.

What is stated now to rebut Judge Will's eminently sensible conclusion, and to require him to engage in a wasteful and duplicative enterprise parallel to and in a race with the state court?

2. Calvert's "Entitlement" to a Federal Forum

(a) Calvert's argument in favor of duplicative litigation seems to be that, having filed a reactive or defensive claim in a federal court to a pending state court action, it is "entitled" to a "federal forum" to decide the issue of whether a security exists, apparently because the federal courts have more experience in such determinations. This is a basic attempt to distort the issues.

The definition of "security" is not exclusively the province of the federal courts. Calvert concedes that actions to enforce liabilities under the 1933 Act may be brought in state courts, and that defenses arising under both the 1933 Act and the 1934 Act, including Rule 10b-5, can be adjudicated in state courts. (*See* Calvert Brief at 5-6.) Such defenses have, in fact, been

asserted by Calvert in the state court. The only circumstances under which a federal court is given exclusive jurisdiction is over suits to *enforce* liabilities under the 1934 Act. To the extent that such jurisdiction is given to the federal court it has been preserved by Judge Will's order.

If courts are to be selected on the basis of comparative expertise, certainly the Illinois state court is more expert than a federal court on the meaning of the Illinois Securities Law, as well as on the Illinois insurance law, a violation of which Calvert has also pleaded. Query which court—state or federal—is more "expert" about the Maryland Securities Act? But the fact is that state courts can and must decide questions of federal law such as the definition of security, and that weighing of relative "expertise" is not of such consequence as to compel wasted judicial manpower and duplication of litigation.

(b) Once we eliminate the erroneous concept that only a federal court can decide a question of the application of federal law, and it is clear that there are two court systems equally capable of handling most, if not all, of Calvert's dispute, the argument for the necessity of duplicative litigation disappears.

One count of the federal complaint does, of course, plead a claim for enforcement of an alleged Rule 10b-5 liability, a claim which under the 1934 Act can be brought only in a federal court. Since, as previously indicated, Calvert has invested nothing in the pool and its only possible damages would be its expenses in joining the pool, a negligible amount in comparison with its potential liability as a pool participant, its Rule 10b-5 claim for damages is obviously simply a device to raise some issue over which the federal court has exclusive jurisdiction.

Even this claim, however, has been preserved to Calvert by Judge Will's order in the event that the claim under Rule 10b-5 raised as a defense in the state action does not result in a judgment dispositive of the federal claim. Calvert apparently asserts that an adverse decision by the state court on the Rule

10b-5 defense would not have res judicata effect. (*See* Calvert Brief at 8.) Plainly, that contention, right or wrong,[4] is not ripe for adjudication and Judge Will made a reasonable judgment that the possibility that at some future time there may be a necessity to relitigate some of the issues decided by the state court would not make it wise or reasonable to litigate the entire matter in both courts at the same time.[5]

3. Calvert's Possible Interest In Delay

In its brief, Calvert argues repeatedly that it has done everything possible to have its "federal securities issues" adjudicated in a federal court, and contends at page 15 that it would have no "interest . . . [in] delay[ing] . . . obtaining the relief to which it thinks itself entitled . . . ." By these arguments, Calvert attempts to divert attention from the real nature of the litigation. As Calvert admits at pages 7 and 8, it is not seeking to recover money paid to American Mutual. It has not paid any money and despite the language of its answer and counterclaim apparently is not in fact claiming any money. Rather, Calvert's purpose is to avoid paying money which American Mutual maintains has long since been due.[6] Therefore, it might plainly be to Calvert's interest to delay the day when it might have to account to American Mutual. It is not necessary to decide whether this is in fact Calvert's purpose, but we point out the possibility in reply to Calvert's suggestion that no such interest exists.

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[4] *Cf. Cramer* v. *General Telephone & Electronics,* 443 F. Supp. 516 (E.D. Pa. 1977).

[5] Moreover, as the discussion, *infra* p. 13-14, points out, Calvert could have had a federal forum and obviated the problems of duplication and waste of judicial time and effort had it removed the state court action to the federal court, which it chose not to do.

[6] For this reason, Calvert's federal claim may not in fact be one "to enforce any liability or duty created by" the 1934 Act, and therefore section 27, 15 U.S.C. §78aa, may not confer exclusive jurisdiction on the federal court. Rather than decide such a technical issue that might ultimately be rendered moot, however, Judge Will stayed adjudication.

As for the suggestion that this case is about complex technical issues of federal securities law, it should be noted that the essence of Calvert's federal action, just as the essence of its defenses in the state action, is that it was materially misled by American Mutual prior to its entry into the reinsurance pool. If Calvert was in fact misled, that would be grounds for recovery under state law principles of deceit and equitable rescission as well as under Rule 10b-5. Indeed, a state cause of action would probably be easier to establish, because under Rule 10b-5, Calvert would have to prove scienter, *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472-74 (1977), while rescission of its obligations may be obtained under state law even for innocent misrepresentations if material.

The federal securities laws do, of course, provide certain securities purchasers with a cause of action simpler in its elements than common law deceit or equitable rescission, *viz.,* section 12(1) of the Securities Act of 1933, 15 U.S.C. §77*l*(1).[7] But the federal courts do not have exclusive jurisdiction under the 1933 Act; Congress specifically provided in section 12(1) that suits may be brought "in any court of competent jurisdiction" including of course state courts. Under the circumstances the question arises why Calvert has chosen to emphasize the Rule 10b-5 claim over which federal courts have "exclusive" jurisdiction. Can it simply be a tactic to delay an adjudication of whether or not it is entitled to abrogate its membership in the reinsurance pool and possibly also to secure a second forum in which to litigate the underlying factual questions, in the hope of securing conflicting results?

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[7] It is not disputed that if Calvert's participation in the reinsurance pool was a "security," it was not registered under the 1933 Act, and Calvert has alleged that registration was required. No discussion appears in the federal complaint, however, of the application of section 12(1) giving a right "to recover the consideration paid," we assume because no consideration has been paid by the plaintiff.

4. Federal Jurisdiction Has Not Been Denied

Calvert repeatedly contends that district courts have a "virtually unflagging obligation" to exercise jurisdiction. This is correct. However, no matter how often Calvert repeats its assertion that Judge Will has disclaimed jurisdiction over Calvert's complaint, that simply is not true. As discussed at length at pages 15 through 20 of our initial brief, Judge Will has expressly retained jurisdiction over Calvert's claim, and the consequences of a stay of litigation are entirely different from the consequences of a dismissal finally disposing of the case by rejecting jurisdiction. Plainly the stay is subject to being lifted at any time on a showing of good cause. *See Landis* v. *North American Co.*, 299 U.S. 248, 257 (1936).

5. Res Judicata Effect

At pages 8-9 of its brief, Calvert argues that whether or not a state court determination of the "security" question would have res judicata or collateral estoppel effect in federal court, Judge Will should have acted immediately. Calvert's argument is plainly misguided.

To the extent that a state decision adverse to Calvert on the security question would not be binding in federal court, Calvert was not prejudiced by Judge Will's stay.

Calvert suggests, at page 14, that we have used "moot" as a euphemism for "barred by res judicata or collateral estoppel." Calvert in making this argument apparently has overlooked the possibility that it will make good its allegations that it was misled, that it may be successful in the state litigation, and that the state court will grant Calvert the relief it has claimed on the ground that it was in fact misled into joining the pool. At that point, Calvert would have nothing left to seek in the federal action and the case before Judge Will would truly become moot.

On the other hand, a conclusion against Calvert in the state action might also be determinative of all issues.

Because of these possibilities, Judge Will realized that judicial efficiency favored staying resolution of the case before him pending the outcome of the state proceedings, which might make it unnecessary to decide the issue, which Calvert states at page 9 is complex, of the collateral estoppel effect to be given state court findings.

6. The *Beacon Theatres* Analogy

On page 9 of its brief, Calvert suggests a "powerful" analogy between the instant case and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). What Calvert fails to point out, however, is that *Beacon Theatres* held only that mandamus was appropriate to protect against the deprivation of the constitutional right of trial by jury, a point on which majority and dissent in that case agreed.

Plainly, Calvert has no right, as we have shown, much less a constitutional right to a federal determination of whether a "security" was involved in the reinsurance pool, and its possible right to the exclusive jurisdiction of the federal court on its Rule 10b-5 claim has been preserved by Judge Will's stay order.

Further, *Beacon Theatres* supports judicial discretion and denies the right to mandamus where discretion exists. See, for the majority, Justice Black's opinion, 359 U.S. at 510. Even more clearly for the dissent, Justice Stewart stated:

> "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial. But there was no denial of such a right here. The district judge simply exercised his inherent discretion, now explicitly confirmed by the Federal Rules of Civil Procedure, to schedule the trial of an equitable claim in advance of an action at law. Even an abuse of such discretion could not, I think, be attacked by the extraordinary writ of mandamus." 359 U.S. at 511-12 (Stewart, Harlan & Whittaker, JJ., dissenting) (footnote omitted).

On the issue of the inappropriateness of mandamus relief where the trial court has discretion, we believe the Court was unanimous. The justices disagreed only on whether a constitutional right to jury trial was being taken away.

We submit that, when anything less than a constitutional right is at stake, *Beacon Theatres* supports the proposition that "the trial court will necessarily have to use its discretion," 359 U.S. at 510, and that therefore mandamus relief is clearly inappropriate. See also *Black* v. *Boyd,* 248 F.2d 156, 161 (6th Cir. 1957), and *Black* v. *Boyd,* 251 F.2d 843, 844 (6th Cir. 1958), cited by Justice Stewart in note 1 to his dissenting opinion in the *Beacon Theatres* case, 359 U.S. at 512.

7. The Significance of *Landis*.

While we would wish to respond to Calvert's blunt assertion at page 12 that "[n]othing in . . . the decision under review negates the general proposition of *Landis* [v. *North American Co.*, 299 U.S. 248 (1936),] that 'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket,'" we are unable to comprehend Calvert's argument sufficiently to respond to it. The thrust of Calvert's brief is that despite, indeed because of the pendency of duplicative proceedings in state court, Judge Will had no discretion, none whatever, to stay the proceedings before him. How this can be reconciled with *Landis* is difficult to understand.

Perhaps the solution lies in Calvert's allegation that to protect the jurisdiction of the federal courts they must exercise that jurisdiction even if it is wasteful and duplicative because it will replicate state litigation involving the same legal issues over which the state courts concededly also have jurisdiction. Plainly there is no support for such a curious proposition. *See, e.g., Langnes* v. *Green,* 282 U.S. 531, 542-44 (1931). Moreover, the logical thrust of such a contention would seem to be not that Judge Will was without power to stay proceedings, but

that he acted unwisely in doing so. In that event, mandamus would not be available as a remedy.

It should be noted that, despite Calvert's remarks about "the federal-state context," *Landis* can in no way be seen as limited to an instance of one federal court deferring to another. The *Landis* Court permitted the trial judge to await the outcome, not of duplicative litigation between the same parties, but of a completely different case involving different parties solely because it might clarify a purely legal question. *See also Kansas City Southern Railway* v. *United States,* 282 U.S. 760, 763-64 (1931):

> "[T]he existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court . . . . The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason."

The only issue in *Landis* was whether an ancient well-established rule permitting—if not requiring—stays to avoid duplication in litigation between the same parties could be extended to cases of parallel suits by other parties. *See* 299 U.S. at 254. Surely, the *Landis* Court would have permitted a judge to stay proceedings while in another court the same parties attempted to get the same relief on substantially the same grounds.

8. Calvert's Failure To Remove

Having argued repeatedly in its brief that the issue before this Court is a very narrow one relevant only to instances "[w]hen a potential defendant in an action under SEC Rule 10b-5 . . . institutes litigation by bringing a state court action for

a declaratory judgment as to the validity of the relevant contract, and the defendant in that action brings its own federal court action under Rule 10b-5," Calvert then argues on page 10 that its failure to remove the state claim to federal court, which would have solved all the problems of inefficiency and piecemeal adjudication, should not have been considered by Judge Will because "[i]n the last analysis, the diversity of citizenship here was fortuitous," and Calvert's failure to exercise the right of removal was ill-considered. But Congress in granting the right of removal determined that if state court jurisdiction were to be ousted this should be done promptly in a fixed period of time not subject to extention. Calvert's decision not to remove may have been ill-advised, but it was final under the law, and, in the exercise of his discretion, Judge Will properly considered it a factor in his determination that fairness did not require him to expend his judicial resources to grant Calvert a second adjudication of its claim while the state litigation was proceeding.

9. Conclusion

It is the right and the obligation of the courts to do as Judge Will has done and avoid duplication to the extent possible. Otherwise, "[w]heels would spin for no practical purpose," *Bankers Trust Co.* v. *Mallis,* 46 U.S.L.W. 4261, 4262 (U.S. 1978). The court below agreed that Judge Will had correctly exercised his discretion, but felt, we submit wrongly, that such discretion had been removed by this Court's decision in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976).

For the reasons demonstrated above and in our earlier brief, it is clear that district judges must have, and traditionally have had, discretion over the ordering of their calendars. So long as such discretion exists, it is plainly improper for a court of appeals to issue an extraordinary writ of mandamus to compel a district court either to engage in a race with a state court or to duplicate the state court's efforts.

The judgment of the court of appeals should be reversed, and the writ of mandamus ordered vacated.

Respectfully submitted,

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Dated: April 14, 1978

Appendix

Cavalier Insurance Corporation
Calvert Fire Insurance Company
300 ST PAUL PLACE
BALTIMORE, MD. 21202

April 22, 1974

Mr. Wallace Winter, President
AMERICAN MUTUAL REINSURANCE COMPANY
One East Wacker Drive
Chicago, Illinois 60601

RE: Multi-Line Reinsurance Agreement

Dear Mr. Winter:

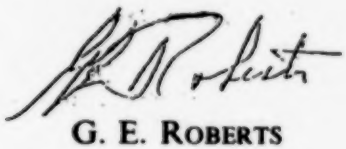
This will supplement my telegram dated April 19, 1974, and also the telephone conversation of April 18, 1974, with our Executive Vice President, Mr. B. K. Vickrey.

One of our considerations for entering the Amreco pool was, of course, your track record over a period of many years and while we realized at the time of our negotiations with your representatives that you may have experienced some adversity in 1973, we were shocked at the final outcome.

It was not until a few days ago when we received your 1973 Annual Report that we had any idea that your loss and expense ratio for 1973 was a terrible 130.1%. Had we had any reason to believe that 1973 would have been so adverse, then you may be sure we would not have agreed to the pool on January 1, 1974.

We feel very strongly that all of the pertinent facts were not provided at the time of our negotiations and ultimate agreement and, therefore, confirm at this time our request for the cancellation of this agreement retroactive to January 1, 1974.

Sincerely yours,



G. E. ROBERTS

GER:ch